Philosophy of Islamic Law And The Orientalists

(A Comparative Study of Islamic Legal System)

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INTRODUCTION

Islamic law is at the cross roads. The choice between revelation and reason is the problem that confronts it today. While the Orthodox Islam lays stress on revelation, the Modernists press the need for rational interpretation of the Qur'ān. They agree, in principle, with the 'school of rational determination of good and bad' that whatever our intellect suggests to us must be good in the sight of God and must be followed. They also agree with the 'school of utility' who believe that good is what ensures the greatest benefit and in the words of Bentham 'the greatest happiness' for the greatest number. Islamic law, according to them, has been revealed for the benefit of man, hence *maslaha* or public interest is all important — 'wherever is the *maslaha*, there is God's law'. They identify *maslaha* with the principle of dynamism which is amenable to reason and without which Islam and its law are both petrified. This is, in a nutshell, the contention of Modernists.

Orientalists, on the other hand, stand for a thorough-going change in Islamic law and their works serve only to add fuel to the fire of militancy against Orthodoxy. To them, there is no middle ground between revelation and reason and they insist on arbitrary opinion (ra'y) and independent value

judgments. It is indeed, a critical situation for Islam and Islamic law has to choose between the two alternatives—revelation and reason.

To solve this problem, we have to study origin, nature and philosophy of Islamic law, on the one hand, and the part played in it by reason, on the other. Further, it needs a thorough survey of Islamic legal system as compared with the legal systems of not only the Western World but the World today. To start with we have to define Islamic law.

Islamic law is Divinely Ordained System, the Will of God to be established on earth. It is called Shari'ah or the (right) path. Qur'ān and the Sunnah (traditions of the Prophet), are its two primary and original sources. Revealed by God, Who alone knows what is absolutely good for humanity, the law is to be meticulously observed and interpreted in letter and spirit. As God is the Perfect Being, so is His Law, Perfect and for all time. With its own ethical norms of virtue and vice, good and evil, it represents the standard of judgment for all human actions. It precedes the State and is not preceded by it. It controls the Society and is not controlled by it. Both the State and Society have ideally to conform to its dictates.

Being the Criterion[1] to distinguish between right and wrong, the Divine Law cannot be exposed to the vagaries of human reason and has to be preserved in its ideal *i.e.*, perfect form. 'Verily We have sent to thee the Book in truth that thou mayst

judge between them as guided by God' (4 : 105) ; 'And those who do not judge by (the light of) what God hath revealed, are indeed rebels (5 : 47), are the Qur'ānic Verses which in definite and unequivocal terms, enjoin upon us strict adherence to the law in all our affairs and at every turn or movement in life.

Companions of the Prophet, therefore, preferred analogical deduction to reason which is subject to change and also liable to err. Reason is, thus, subordinated to analogy. They interpreted and applied the law by means of Analogy or Qiyās and were the first to act upon Analogy when confronted with the problem of the election of Abu Bakr to the Caliphate. Thus Analogy came to be known as a source of law but, in reality, it is only a derivative as declared by Shafi'i. Its derivative nature is proved by the fact that whatever it extracts from the text (Qur'ān and the Sunna) is not law but is necessarily to be authenticated by Ijma, to attain the status of law. Ijma is the consensus of the learned, as a body, to ratify analogical deduction. The infallibility of Ijma is established by the saying of the Prophet : 'My community will not agree upon an error'. Ijma is, thus, a source of law to ensure the conformity with the text of what has been deduced by Analogy. Such is the degree of care to preserve the law in its ideal form. Analogy and Ijma are, therefore, subordinate to the Original sources so that the Law may be protected against the encroachments of the fallible reason.

For further elucidation, Analogy is to discover the law and not to establish or create it. It furnishes the views of the Jurists as to the chief cause of the revealed rule so that it may be extended to cases of similar nature. And it is for Ijma to decide which of the views conforms to the text, since finality rests with the text alone : 'If ye differ in anything among yourselves, refer it to God and His Apostle, if ye do believe in God and the Last Day : That is best, and most suitable for final determination.'[2]

Jurists are the qualified individuals who are required to exercise their efforts to understand the law (which is described as Fiqh) and discover thereby the chief cause of the revealed rule. Their views, as such, are mere opinions and not the law, hence it is incumbent upon the judge and the other jurists or the learned in law to investigate the source of such opinion and not to follow it if they find it incorrect.

Orientalists take the opinion for law. They present the divergence of opinion among the Jurists as conflicts and tensions in the law itself and pass sweeping remarks that Sharia is a 'Jurists' Law',[3] 'a speculative essay'[4] and so on and so forth. To Orientalists, the Jurists' manuals, which contain their opinions, are the books of law and 'it is not for a Muslim Judge (Qaḍi) to interpret the Koran.'[5] Not content with this they declare that the Islamic law is merely idealistic[6] and there is no positivism in it, but their own positivism itself is subject to conflicts. While Analytic Positivism stands for 'rigid stability in law' Pragmatic Positivism believes in 'law in

flux'. Both are poles apart in their conception of law.

Orientalists are, in fact, unaware of their own laws, let alone the Sharia law whose langeuge they have not mastered. Commenting upon the works of the Orientalists, Mahmassani has rightly remarked : 'We have been accustomed to seeing these people write about subjects whose language they have not mastered and of prim ary sources of which they are ignorant. It is inexcusable to hide or to disfigure established scientific facts, no matter what the reason for doing so may be. It is irrelevant whether the reason be a mistake, a result of haste, the lack of diligence, ignorance, bias, or a mixture of all these factors.'[7]

Strangely enough, they use 'positivism' to mean 'fluidity in law' and 'idealism' to mean 'speculation', while the word 'positive' means 'definite' and points to the stability in law and the word 'ideal' means 'perfect'. Shari'ah, being divine law, is positive as well as ideal *i.e.* stable and perfect both.

It appears that Orientalists have launched a campaign to subvert Islam by their unfair criticism of Islamic Law. They say that Shari'ah is far from realism *i.e.*, the present condition of society, and that it should be determined by social facts and reason be given free reins. All this goes to reduce Sharia to the position of man-made laws which are not only subservient to society but also change with change in it, while the chief purpose of Sharia is to control it. Why, at all, should Sharia change when it contains broad principles which accommodate the change

and there is the Rule of Necessity and need to provide for the growing needs of society.

Unlike Western laws which are either too rigid or too flexible Islamic Law has an amazing capacity to reconcile stability with change. Austin is in favour of stability in law and positive law, according to him, is the command of the sovereign. This represents the separation, in principle, of the law as it is and the law as it ought to be. Austin's positive law is, therefore, rigidly stable and has no concern with 'the ought' or 'the purpose' of law which lies in Justice, while Justice is the supreme end of Islamic Law.

As the Command of God Who is the Sovereign of All, Islamic Law is positive *i.e.*, stable, and with Justice as its supreme end it is ideal, hence it may be aptly described, in modern terms, as 'Positive law in ideal form'. It is, thus, the only law, perfect and pure, universal and for all time.

The present work is the result of a comparative study of law and is divided into five parts — Philosophy, Law in General, Islamic Law, Orientalists and the Recent Publications, Islamic Legal System as compared with the Legal Systems of the World. The citations from the Qur'ān are mostly from the translation of it by Abdullah Yousuf Ali. There are also Notes and a Select Bibliography at the end.

PART I

PHILOSOPHY

* Main Branches of Philosophy

1

MAIN BRANCHES OF PHILOSOPHY

Since we are concerned with the philosophy of Islamic law, and Orientalists accuse it of idealism, we have to study philosophy in its relation to law and examine what idealism is. A definition of the term 'philosophy' is not possible. The word 'philosophy' is derived from the composite Greek noun 'philosophia' which means love or pursuit of wisdom (philein, to love—sophia, wisdom). It is, thus the endeavour to discover by systematic reflection the ultimate nature of things.

Although originally a rational description of anything, philosophy is called the science of sciences, the criticism and systematization or organization of all knowledge, drawn from empirical science, rational learning, and common experience. The two main branches of philosophy are : (1) Metaphysics, (2) Epistemology or Theory of Knowledge—the study of the origins of knowledge, its nature and limits.

1. Metaphysics

The word 'metaphysics', in the ordinary Greek, meant 'that which comes after physics', 'meta' being the Greek word for 'after'. Philosophy, in its wider sense, is the pursuit of knowledge of things and their causes, and metaphysics is the department of know-

ledge or study which deals with ultimate reality.

Here it may be mentioned that according to materialism nothing but space-filling physical objects are ultimately real, while idealism holds that only spiritual beings are ultimately real and that other things are to be explained as ideas. The word 'idealism' is derived from the Greek word 'idea', which means, in nontechnical language, a visible form or the look or appearance of something. The word became a technical term in the philosophy of Plato, who used it to mean a universal by contrast with particulars.

The word 'idea', thus, was first used in philosophy to mean Platonic ideas, i.e., supersensible universals or forms held to be fully apprehended by the intellect and contrasted with particular things defectively presented to the senses.

Idealism is described as a system in which the object of external perception is held to consist, either in itself, or as perceived of ideas. Subjective idealism is the opinion that the object of external perception consists, whether in itself or as known to us, in ideas of the perceiving mind ; Critical or Transcendental Idealism, the opinion (of Kant) that it consists, as known to us, but not necessarily in itself, of such ideas ; Objective Idealism, the opinion (of Schelling) that while, as known to us, it consists of such ideas identical with those ; Absolute Idealism, the opinion (of Hegel) that it consists, not only as known to us, but in itself, of ideas, not however our but those of the universal mind.

Idealism is, in fact, derived from 'idea' which

according to Plato is an eternally existing pattern of any class of things, of which the individual things are imperfect copies, and from which they derive their existence. Plato's picture of the universe is that the real and permanent part is the world of ideas or forms. The world of ordinary experience is an illusory and transitory sequence of events which take place in the physical world, the realm of appearance, rather than of reality.

In Aristotle's analysis, one has to recognise two basic elements in any possible natural event. The first of these is that there must be something which remains the same, and yet is, somehow subject to variation. The other is that there occur genuine changes of qualities. For instance when an acron grows into an oak, there must be some permanent feature that has at one time the qualities that we call an acron, and later, those that we call an oak. Thus each and every object in this world has a permanent nature which it presents through its realization or acquisition of different forms. Each and every object can be understood only in terms of both its matter and its form, and the processes by which it grows, alters, or moves, that is, replaces one form with another. The object is always in some state and is in process of reaching some other state. Thus, the formal, changing aspect, and the material, permanent aspect of any object are always present and always constitute the basis for an explanation of what is occurring.

While Plato, guided by the change in this world, conceived of it as unreal, Aristotle with the help of

an analysis proved this world to be permanent and real, the process of change being the movement towards its end or perfection. Aristotle includes in his theory the notion of purpose-teleology—and holds that all the objects of our experience consist of formed matter moving or changing in a pattern that is usually purposeful. The motives or changes occur in order to achieve some goal, for example, acrons always grow into oak trees, never into anything else. Every object in its natural history seems to be trying to realize or obtain a certain form proper to it and its actions are all directed towards this goal or end.

Each and every object, says Aristotle, can be understood in terms of both its matter and its form, and the process by which it grows or develops. So the reality of an object consists of both its form and matter, and not the form alone as held by Plato. The 'Platonic ideas', according to Aristotle, are actually 'numbers', i.e., collection of units which, for example, may be explained in the following way :

Let there be a question : What is Justice ? In trying to answer this question we do not simply make a list of individual actions that are called just ; we, instead, try to find the common nature that all just acts share which makes us recognize them as just acts. This common nature or quality which gives them their identity is the form or idea of justice. These forms or ideas do not change. Such ideas are not amenable to sense perception and can only be appreciated by intellect or reason. The ideas, for reasons set forth above, are called 'Universals' which are real and eternal, while the 'particulars' of this world

are mere appearances and unreal. Thus reality consists of unchanging ideas. The things may change but the ideas do not change. Such is the Platonic theory of ideas and forms.

In contradistinction to it is the theory of Aristotle that reality consists not of transcendental ideas or forms, but of individual, observable phenomena, with the application of human intellect to it. By 'forms' Plato meant eternal and unchanging entities which are encountered not in perception but in thought. He thought that there is a world of forms, over and beyond the sensible world, and that these forms are nonphysical, nonspatial and nontemporal and yet very real. For him, forms cannot be known in sense-perception, they are known in thought and are, in fact, the objects of thought.

Plato had sought to locate reality in an immaterial world of forms and had been unable to relate values to the world of sense-perception. He tended to equate forms with reality ; Aristotle denied that form is coextensive with the real. Plato and Aristotle represent two different attitudes towards the world. To Plato, this world is the world of change and is unreal, while Aristotle holds it to be real and the change only a succession of forms which matter assumes in the process of development. Plato was outwardly an idealist, Aristotle was practical. For Aristotle, biology was the leading and, as it were, model science, which he relied upon to refute the idealism of Plato.

We have, so far, dealt with the Philosophical thought, of the two famous Greek Philosophers, as

regards reality of things. Now it remains to be seen how far philosophers have been successful in their attempt to discover the sources of genuine knowledge so that we may reliably judge the truth and falsity of things.

2. Epistemology or Theory of Knowledge

Of what could human beings know with certainty? is usually the question, for everything we claim to know is to some degree open to doubt. For this reason, philosophers have tried to develop a theory of knowledge to account for the source, basis, and certainty of our knowledge. Some philosophers—the rationalists—have tried to find a completely certain foundation of our knowledge in terms of certain procedures of human reasoning. They sought for knowledge in the strongest possible sense, i.e., information which under no circumstances could be false. Usually the rationalists found that such knowledge could not be discovered in sense experience, but only in some mental realm.

Descrates (1596-1650) assumes that every one is familiar with the phenomenon of being deceived by his senses. One may see something at a distance which turns out to be quite otherwise when seen close up, or see things differently when they are in water from when they are out of it, e.g., when one is rowing, the oar appears to be bent. He suggests that the particular objects that we experience, talk about, live with, may be part of a continuous dream world. To him, sensory knowledge is, therefore, deceitful.

It is of interest to note that in ancient Greek

Philosophy, one of the oldest positive theories of knowledge was developed. The Sophists of the fifth century B.C. were extremely doubtful about the possibility of discovering anything that was true. They developed the view that knowledge in its strict sense was unattainable, therefore, man should not bother to seek what he can never find. So he should 'measure' matters according to his own nature and needs, since man alone was the measure of all things.

Socrates was convinced that one could act only on the basis of the truth. In various Dialogues, Plato, in his presentation of Socrates, tried to construct a theory of knowledge—what knowledge was available, how we could obtain it, and why it was true.

Briefly, Plato's view was that knowledge consists in apprehension of those aspects of the world which never change, never alter. He believed that the world contained such constituent elements, which he called 'ideas' or 'forms'. This has already been explained by us in the preceding pages.

The way to obtain complete and true knowledge, according to Plato, is, first, to give up any reliance upon sense information and turn instead to examining the intelligent world through the aid of one's reasoning power only.

Later, we find in Descartes another positive theory of knowledge. His views about the nature, source and basis of our knowledge in many ways resemble those of Plato. He carried on his test in search of some information which would be indubi-

table and certain and at last found it in the certainty of his own existence. The only piece of information which Descartes had found to be true was 'I exist'. His contention is that by inspecting the one truth ('I think, therefore I am') he can discover a rule or criterion about all truths. To him, 'whatever is clearly and distinctly conceived, is true'.

Theories of knowledge like those of Plato and Descartes are called 'rationalistic' because they assert that by employing certain procedures of reason alone we can discover knowledge in the strongest sense, knowledge that can under no circumstances possibly be false. Usually such rationalistic theories maintain that we cannot find any absolutely certain knowledge in sense experience, but have to seek for it only in the realm of the mind. Both Plato and Descartes claim that true knowledge is clearly within us in the form of innate ideas of right and wrong contained in the mind which we do not acquire, but are born with. It is further maintained by rationalists that what we know as certain by various rationalistic procedures is the real world. The world that cannot be known with certainty is generally judged to be an illusory or unreal or unimportant world.[1]

Opponents have challenged philosophers like Plato and Descartes, denying that we ever actually possess such certainty or that there are any 'Platonic ideas' or 'inner', 'clear' and distinct ideas of Descartes. All that is offered by these philosophers is nothing more than their personal fantasy, neither visible nor tangible. Hume (1711-76), and many

empiricists have rejected rationalist claims of complete certainty and began with the sense experience as the source and basis of real knowledge. John Locke (1632-1704), tried to work out an explanation of knowledge in terms of sense experience in his Essay Concerning Human Understanding. He argued that knowledge comes through the senses and that mind does not contain any innate ideas of right and wrong as claimed by Descartes. Hume, on the other hand, completely relied on experience as the source of knowledge and abolished mind altogether.

Kant (1724-1804), in his 'Critique of Pure Reason' tried to bring about a reconciliation between an idealistic rationalism, characterized by a belief in the primacy of thinking over experience, and an empirical sensualism, or the assumption of the dependence of all human knowledge upon sense perception. Kant took the position that 'sensations' are the only source of our knowledge of objects in the empirical world. However, he viewed sense experience as conditioned by the constitution of human mind, which, in his opinion, contained certain forms of cognition or understanding by which the fleeting impressions of the senses are absorbed, coordinated, and integrated. Among these forms and categories of cognition indigenous to the human mind he listed the concepts of space, time, and causality, as well as the propositions of mathematics. All of these he considered not as products of experience but as a *priori* categories brought by the knowing observer to the data of senses.[2]

Kant's 'Critique of Pure Reason' is not precisely a criticism, but a critical analysis of reason to show its limitations. For him, reason, although it has limitations, is yet superior to experience as the source of knowledge. Hume entirely relies on experience as the true source of knowledge. Kant argues that experience is by no means the only field to which our understanding can be confined. Experience tells us what is, but not that it must be necessarily what it is and not otherwise. It, therefore, never gives us any really general truths ; and our reason, which is particularly anxious for that class of knowledge, is roused by it rather than satisfied. General truths which at the same time bear the character of an inward necessity, must be independent of experience—clear and certain in themselves.[3] Experience, says Kant, gives us nothing but separate sensations and events which may alter their sequence in the future. It is mind, an active agent, which moulds and co-ordinates sensations into ideas and transforms the chaotic multiplicity of experience into the ordered unity of thought.

He elucidates by example how 'perceptual' knowledge of objects passes into that of the conceptual. Sensation, he says, is merely the awareness of a stimulus ; we have a taste on the tongue, an odour in the nostrils, a sound in the ears, a flash of light on the retina but all this is the raw, crude beginning of experience. It is not yet knowledge but if these sensations group themselves about an object in space and time, say this apple, there is now an awareness not so much of a stimulus as of a

specific object. Here is now a perception, and sensation has passed into knowledge.

Sensations do not arrange themselves into an order. They come to us through varied channels of sense and wait to be ordered into meaning and purpose. There is the co-ordinating power that receives them and moulds them into sense and that is Mind. Thus sensation is unorganized stimulus, perception is organized sensation, conception is organized perception. 'Perceptions without conception', says Kant, 'are blind.'[4] So his critique ends, but its most eloquent portions argue that pure or theoretical reason is applicable only to phenomena that appear to such experience ; objects of faith – a free and immortal soul, a benevolent creator—can never be proved by reason. 'Faith must be put beyond the reach of reason'.[5]

Thus, reason, according to Kant, has its own limitations, while others have no faith in it and Hume has abolished Mind altogether. "No one", says Bertrand Russell, "has succeeded in developing a theory of knowledge which is both credible and consistent".[6] This leads us positively to the conclusion that neither senses nor reason can be the basis of sure knowledge. The question is : What is the way out ? In answer we have to point to revelation which alone is the source of real knowledge and can guide us to the ultimate reality. The attempts of senses and reason, in solving the ultimate problems, end in failure because they vary from man to man and because the finite cannot grasp the ultimate. God alone possesses the perfect

Knowledge of all things. He is the Creator and Sustainer of the Universe. He is not only Omnipotent but also Omnipresent and Omniscient. His Law is, therefore, perfect and all-comprehensive. Orientalists accuse it of idealism, but idealism, as we have seen, has no definite meaning. Let us, now, take up law in general to mark the distinction between it and the Divine Law.

PART II

LAW IN GENERAL

* Different Aspects of Law
* Natural Law
* Positive Law
* Philosophy of Law

2

DIFFERENT ASPECTS OF LAW

(a) What is Law ?

There is no complete answer to this question.. As defined in the Oxford English Dictionary, it is 'the body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects'. But in its widest sense 'the term law includes any rule of action, that is to say, any standard or pattern to which actions (whether the acts of rational agents or the operations of nature) are, or ought to be conformed'.[1] According to Hooker the term law applies to any kind of rule or canon whereby actions are framed, while Blackstone says that 'law in its most general and comprehensive sense signifies a rule of action, and is applied indiscriminately to all kinds of action whether animate or inanimate, rational or irrational'.

There are several definitions of law with regard to its various functions and different aspects. Here are some of the schools of law to give us an idea of its nature and purpose.

(b) Schools of Law

To the Teleological schools, law is the product of reason and is intimately related to the notion of

purpose, so the question arises : What is the supreme end of law ? Most of the philosophers regard justice as the supreme end and make a distinction, between natural and conventional justice, which leads to a great controversy and a long metaphysical discussion. Kelsen, in his attempt to free the law from the metaphysical mist lays stress on the pure science of law. He is thus in revolt against philosophy and desires to create a pure science of law, stripped of all irrelevant material, and to separate jurisprudence from the social sciences. According to him the science of law is the study of the nature of norms set up by law. Ethics and social philosophy are, thus, far from law, while Pound emphasizes the sociology of law since it is deeply concerned with the needs of society. He represents the Functional school whose tenet is that we cannot understand what a thing is unless we study what it does. To him, 'law is more than a set of abstract norms, it is also a process of balancing conflicting interests and securing the satisfaction of the maximum of wants with the minimum of friction'.[2]

Savigny of the Historical school is of the opinion that the source of law is the custom which lies deeply embedded in the minds of men. This school considers law in direct relationship to the life of the community. Law evolved, as did language, by a slow process and, just as language is a peculiar product of nation's genius, so is the law. The source of law is not the command of a sovereign, not even the habits of a community, but the instinctive sense of right possessed by every race. 'Legislation can

succeed only if it is in harmony with the internal convictions of the race to which it is addressed. If it goes farther, it is doomed to failure'.[3] This is what Savigny thinks of law.

Austin of the Imperative school regards law as the command of the sovereign. This is, according to him, the positive law—'a general rule of conduct laid down by a political superior to a political inferior'. His aim was to separate positive law sharply from such social rules as those of custom and morality, and the emphasis on command achieves this end. The notion of command implies a threat of a sanction if it be disobeyed.

Jurisprudence, according to Austin, is a rigid science of positive law entirely concerned with the exposition of the general principles and leading terms of the law such as Right, Obligation, Injury, Sanction, Punishment and Redress. Jurisprudence, as such, has nothing to do with the goodness or badness of law and must be distinguished from legislation which is based upon the principle of utility, that is, the greatest happiness of the greatest number which is an accepted principle of the modern world and a view that finds expression in Bentham's utilitarianism.

(c) Bentham's Philosophy

The essence of Bentham's philosophy is that 'nature has placed man under the empire of pleasure and pain. We owe to them all our ideas; we refer to them all our judgements, and all the determinations of our life. He who pretends to withdraw himself

from this subjection knows not what he says. His only object is to seek pleasure and to shun pain . . . These eternal and irresistible sentiments ought to be the great study of the moralist and the legislator. The principle of utility subjects everything to these two motives'.[4]

Bentham bases his philosophy on the principle of greatest happiness. According to Bertrand Russell there is an obvious lacuna in Bentham's system. If every man always pursues his own pleasure, how are we to secure that the legislator shall pursue the pleasure of mankind in general. Bentham's theory is criticized by many others as contradictory in itself. According to its conception of desire and motive, the whole object of attractions is the obtaining of personal pleasure, while the proper standard for judging the morality of an act is its contribution to the pleasure of others. In Bentham's theory 'desire for private pleasure as the sole motive of action and universal benevolence as the principle of approval are at war with each other'.

'It would be only a poor sort of happiness', remarked George Eliot, 'that could ever come by caring very much for our narrow pleasures'. It is, indeed, better to be a human being dissatisfied than a pig satisfied. In fact, there can be no standard of judgement as to what exactly constitutes pleasure and morally speaking, says Dewey, pleasure as an end cannot be considered 'good', for a wily person takes pleasure in his wickedness and so on. The utilitarian theory that the pleasure is the good and the end is baseless and also immoral.

So far we have dealt with the leading schools of law. A deeper study of their views discloses the fact that the concept of law is based upon two extreme positions. While one emphasizes the coercive character of law, the other lays stress on the social acceptance of it. The coercive aspects—Sovereign Command and Sanctions—are pivotal to the theories of Austin and Kelsen. By contrast the social acceptance of law and the observance of it by the community are central to the thoeries of Savigny. To Savigny, customs are the living law which may receive authoritative confirmation from the sovereign but it is not created by him. Customs being the approved ways of the community, were regarded as of divine which the Kings received for the administration of justice, hence the Teleological school considers justice as the end of law.

'In Homer's Work', says Friedmann, 'law has an essential but unproblematical place. Law is embodied in the Themistes which the Kings receive from Zeus the divine source of all earthly justice and which are based on custom and tradition. Justice is still identical with order and authority. An awareness of the conflict between positive law and justice becomes more and more pronounced from the eighth century onwards. It arises against a background of social trouble, of discontent with the rule of aristocracy and frequent abuse of power. The problem of justice becomes atriculate in the poems of Hesiod and of Solon, the great Athenian law-giver. Both appeal to Dike, the daughter of Zeus, as a guarantor of justice against earthly tyranny, violation of rights

and social injustice. Solon sees Dike as rewarding civil unrest and injustice with social evils while she rewards just communities with peace and prosperity.[5]

(d) Greek Philosophers

Here it becomes clear why the Greek Philosophers thought of justice as the supreme end of law. It was on account of the social disorders, internal conflicts, tyranny and arbitrariness of the rulers that the need for justice became more pressing and the problem of the relation between justice and positive law dominated the Greek thinking.

Plato (429—348 B.C.), was deeply convinced of the natural inequality of men, which he considered a justification for the establishment of a class system in his common-wealth. 'Justice' meant in Plato's eyes that 'a man should do his work in the station of life to which he was called by his capacities'. Every member of society, according to him, has his specific functions and should confine his activity to the proper discharge of these functions. Some men have the power of command, the capacity to govern. Others are capable of helping those in power to achieve their ends, as subordinate members of the government. Others are fit to be tradesmen or artisans, or soldiers'.[6]

Plato, in his Republic, underplayed the necessity for law, but Aristotle (384—322 B.C.) took a teleological view of law, and formulated more carefully the theory of justice. 'He regards justice as meaning either what is lawful, or what is fair and equal. He

made a useful distinction between natural justice, which is universal, and conventional or legal justice, which binds because it was decreed by a particular authority'.[7] The former derives its force from natural law and the latter from Positive law, which reflects the tension between the two. Let us, now, turn to natural law which was sought after as a source of natural justice and a relief against the tyranny of positive law—the law of the autocrats.

3

NATURAL LAW

(a) Historical Background

'The history of natural law', as remarked by Friedmann, is 'a tale of the search of mankind for absolute justice and of its failure. Again and again, in the course of the last 2,500 years, the idea of natural law has appeared, in some form or other, as an expression of the search for an ideal higher than positive law after having been rejected and derided in the interval. With changing social and political conditions the notions about natural law have changed. The only thing that has remained constant is the legal appeal to something higher than positive law.[1] Positive law is concerned with what law 'is', and natural law with what law 'ought to be'.

The story of natural law begins with the philosophers of ancient Greece. 'The legal conceptions of the archaic age of the Greeks are known to us through the epic works of Homer and the poetry of Hesiod. Law at that time was regarded as issuing from gods and known to mankind through revelation of the divine will. Hesiod pointed out that wild animals, fish, and birds, devoured each other because law was unknown to them ; but Zeus, the Chief of Olympian gods, gave law to mankind as his greatest

present. Hesiod thus contrasted the nomos (ordering principle) of non-rational nature with that of the rational (or at least potentially rational) world of human beings. Foreign to his thought was the scepticism of some of the Sophists of a later age, who sought to derive a right of the strong to suppress the weak from the fact that in nature the big fish eats the little ones. To him law was an order of peace founded on fairness, obliging men to refrain from violence and to submit their disputes to an arbiter'.[2]

(b) Law of Fairness

This shows the conception of law, of the ancient Greeks, as founded on fairness. Law and religion remained, for them, largely undifferentiated. The famous oracle of Delphi, considered an authoritative voice for the enunciation of the divine will, was frequently consulted in matters of law and legislation. The forms of law-making and adjudication were permeated with religious ceremonials, and the priests played an important role in the administration of justice. The King, as the supreme judge, was believed to have been invested with his office and authority by Zeus himself.[3]

'An incisive change in Greek Philosophy and thought took place in the fifth century B.C. Philosophy became divorced from religion, and the ancient, traditional forms of Greek life were subjected to searching criticism. Law came to be regarded not as an unchanging command of a divine being, but as a purely human invention, born of expediency and

alterable at will. The concept of justice was likewise stripped of its metaphysical attributes and analyzed in terms of human psychological traits or social interests.'[4]

(c) Justice

Those who brought about such a change in thought were called the Sophists. To them, might was right and justice nothing else than the right of the stronger, and human nature identical with egoism. Socrates set himself the task of overcoming the subjectivism and relativism of the Sophists and of establishing a substantive system of ethics based on an objectively verified theory of values. Proceeding on the lines suggested by his master, Plato, held, as stated above, that justice consists in the proper discharge of the specific functions assigned to a person, that is, 'a man should do his work in the station of life to which he was called by his capacities'. Aristotle's theory of justice is more carefully formulated. As already explained he makes a distinction between natural and conventional justice. 'Aristotle, in his Logic, sees the world as a totality comprising the whole of nature. Man is part of nature in a twofold sense : on the one hand he is part of matter, part of the creatures of God and as such he partakes of experience ; but man is also endowed with active reason which distinguishes him from all other parts of nature. As such he is capable of forming his will in accordance with the insight of his reason.'[5]

(d) Human Reason

It is this recognition of human reason as part of nature which provided that basis for the Stoic conception of the law of nature. The Stoics developed this principle into an ethical one. Reason, according to them, governs the universe in all its parts. Thus man, a part of universal nature, is governed by reason. Reason, it is argued, orders his faculties in such a way that he can fulfil his true nature.

The Stoics popularized the maxim, 'Live according to nature'. This did not necessarily mean 'in primitive simplicity'. 'A thing was in accord with nature when it was governed by its own leading principle, and in the case of man this was reason. The universe itself was governed by a reason similar to that which dwelt in man, and hence he who based his life on a rule of reason could face the world with confidence ; for whether he understood or not the turn of fortune's wheel, a universe based on reason could not be hostile to him. The Stoics, perhaps in a superficial way, thus erected a popular theory of the unity of life out of the deeper elements of Greek thought.'[6]

The Stoic School of Philosophy was founded by a thinker of Semitic origin by the name of Zeno (350—260 B.C.). Zeno and his followers placed the concept of 'nature' in the centre of their philosophical system. By nature they understood the ruling principle which pervades the whole universe and which, in a pantheistic manner, they identified with God. This ruling principle was of an essentially

rational character ; to Zeno the whole universe consisted of one substance, and this substance was reason. 'Man as a part of cosmic nature, was an essentially rational creature. In following the dictates of reason, he was conducting his life in accordance with the laws of his own nature'.[7]

(e) Stoic Philosophers

'Reason, as a universal force pervading the whole cosmos, was considered by the Stoics as the basis of law and justice. Divine reason, they held, dwells in all men everywhere, irrespective of nationality or race. There is one common law of nature, based on reason, which is valid universally throughout the cosmos. Its postulates are binding upon all men in every part of the world. The Stoic Philosophers taught that there should not be different city-states, each distinguished from the rest by its own peculiar system of justice. They developed a cosmopolitan philosophy, founded on the principle of the equality of all men and the universality of natural law. Their ultimate ideal was a world state in which all men would live together harmoniously under the guidance of divine reason.'[8] But what is Divine reason in relation to man ? As is evident from the above it is none else than human reason itself considered in terms of divine, for it is God who has given him the intellect, the faculty of reasoning.

Cicero (106—43 B.C.), the great Roman lawyer and statesman, was strongly influenced by the ideas of the Stoic Philosophers. Like them he was inclined to identify nature and reason and to assume that

reason was the dominating force in the universe. Here Bodenheimer points out that 'in ascribing 'natural force' to the law, Cicero made it clear that the mind and reason of the intelligent man was the standard by which justice or injustice were to be measured.'[9] How far is this correct ? Can reason be a standard by which to measure justice and injustice ? Who can be more intelligent than the great philosophers of the past, but no two philosophers agree on a point and each one has his own views of justice.

(f) Destruction of Natural Law

Reason, however exalted, is nothing but a guess, a conjecture which can hardly take the place of truth.[10] According to the celebrated statement of David Hume (1711-76) reason 'is and ought only to be the slave of the passions and can never pretend to any other office than to serve and obey them'. This statement of Hume not only undermined the foundations of natural law but also implied that reason is essentially the slave of human passions which alone inspire human actions. Reason in itself dictates no way of acting but is dictated by passions. The criticism and gradual elimination of the system of natural law culminated in Hume's Treatise on Human Nature, published in 1739-40.

'Kant's Critique of Pure Reason' bears witness to the limitations of reason. Divergence in conceptions of nature and reason has resulted in conflicting theories of natural law. Reason is subject to change and has given turns and twists to natural

law. Salmond admits the diverse qualities and aspects of natural law and says: 'Natural law has received many other names expressive of its diverse qualities and aspects. It is Divine Law (Jus divinum) — the Command of God imposed upon men—this aspect of it being recognised in the pantheism of the Stoics, and coming into the forefront of the conception as soon as natural law obtained a place in the philosophical system of Christian writers. Natural Law is also the Law of Reason, as being established by that Reason by which the world is governed, and also as being addressed to and received by the rational nature of man. It is also the Unwritten Law (Jus nonscriptum), as being written not on brazen tablets or on pillars of stone, but solely by the finger of nature in the hearts of men. It is also the Universal or Common Law (Jus commune, Jus gentium), as being of universal validity. The same in all places and binding on all peoples, and not one thing at Athens and another at Rome, as are the Civil Laws of states (Jus civile). It is also the Eternal Law (lex aeterna), as having existed from the commencement of the world, uncreated and immutable. Lastly, in modern times we find it termed the Moral Law, as being the expression of the principles of morality'.[11]

Based as it is upon reason, natural law can neither be universal, nor for all time, for reason varies from man to man and place to place. Ihering has already rejected the idea of a natural law for all nations and times as being 'no better than that medical treatment should be the same for all patients'. Societies differ from one another in their

form and social character, hence natural law, which is, after all, the product of reason, cannot be applied to them indiscriminately. Future, social facts, in modern society, determine the legal concepts, so the law cannot remain stable.

'Throughout the Middle Ages', says Bertrand Russell in his History of Western Philosophy, 'the law of nature was held to condemn 'usury', i.e. lending money at interest. Church property was almost entirely in land, and landowners have always been borrowers rather than lenders. But when Protestantism arose, its support—especially the support of Calvanism—came chiefly from the rich middle class, who were lenders rather than borrowers. Accordingly first Calvin, then other Protestants, and finally the Catholic Church, sanctioned 'usury'. Thus natural law came to be differently conceived, but no one doubted there being such a case.'[12]

Some parts of Locke's natural law, according to Bertrand Russell, are surprising. For example, he says that captives in a just war are slaves by the law of nature. He says also that by nature every man has to punish attacks on himself or his property, even by death. He makes no qualification, so that if I catch a person engaged in petty pilfering, I have apparently by the law of nature a right to shoot him.[13]

The spiritual, social and political revolution which is marked by the Renaissance, the Reformation and the rise of the national state, was bound to create new problems. The absolute rulers, for instance, demanded the legitimation of their claims

to omnipotence over their subjects, while the subjects demanded rights to safeguard their interests. The rising commercial middle class, on the other hand, insisted on protection of its rapidly increasing property interests. They all appealed to natural law for justice with the result that natural law could find no way out except to change itself according to the circumstances and act up to the spirit of the times.

Montesquieu (1689-1755), in his Esprit des Lois, held that law, although based on some principles of natural law, must be influenced by environment and conditions such as climate, soil, religion, custom, commerce, etc. With Montesquieu on the one hand and Hume, on the other, the era of natural law as developed from Grotius onwards came to an end.

The history of natural law, as stated by Friedmann, is the search of mankind for absolute justice but, owing to the wrong approach, the search was in vain. Vagrant reason if made the basis, cannot lead aright, revelation alone is a sure guide to the right path—the path of abolute justice. Now, let us see what positive law connotes.

4

POSITIVE LAW

(a) What is Positivism ?

Positivism, in its modern sense, is a system of philosophy elaborated by Auguste Comte (1798-1857), which recognizes only positive facts and observable phenomena, with the objective relations of these and the laws which determine them, abandoning all inquiry into causes or ultimate origins. Comte, the French Mathematician and Philosopher, distinguished three stages in the evolution of human thinking. The first stage in his system, is the theological stage, in which all phenomena are explained by reference to supernatural causes and the intervention of a divine being. The second is the metaphysical stage, in which thought has recourse to ultimate principles and ideas, which are conceived as existing beneath the surface of things. The third and last stage is the positive stage, which rejects all hypothetical constructions in philosophy and confines itself to empirical observation and connection of facts under the guidance of methods used in the natural sciences.[1]

As far as the philosophy of law is concerned, the law in the Middle Ages was strongly influenced by theological considerations. The period from the Renaissance to about the middle of the nineteenth

century, on the other hand, may be described as the metaphysical era in legal philosophy. The classical law-of-nature doctrine as well as the evolutionary philosophies of law advocated by Savigny, Hegel, and Marx were characterized by certain metaphysical elements. These theories sought to explain the nature of law by reference to certain ideas or ultimate principles.

In the middle of the nineteenth century a movement started against the metaphysical tendencies of the preceding centuries. This movement may be described as positivism which, as a scientific attitude, rejects *a priori* speculations and seeks to confine itself to the data of experience.

Beginning with the second half of the nineteenth century, positivism invaded all branches of the social sciences, including legal science. It sought to exclude value considerations from the science of Jurisprudence and to confine the task of this science to an analysis and dissection of positive legal orders. The legal positivist holds that only positive law is law ; and by positive law he means those juridical norms which have been established by the authority of the state. He also insists on a strict separation of positive law from ethics and social policy, and tends to identify justice with legality, that is, observance of the rules laid down by the state.

In modern legal theory 'positivism' has acquired major significance. Legal positivism has manifested itself in jurisprudence of an analytical type, here designated as analytical positivism. 'Analytical

positivism takes as its starting point a given legal order and distils from it by a predominantly inductive method certain fundamental notions, concepts, and distinctions, comparing them perhaps with the fundamental notions, concepts, and distinctions of other legal orders in order to ascertain some common elements.[2] In this way it provides the science of law with an anatomy of a legal system : 'The separation, in principle, of the law as it is, and the law as it ought to be.'[3]

(b) Austin's Theory of Law (Analytic Positivism)

The work of the English Jurist John Austin (1790-1859) is the most comprehensive and important effort to formulate a system of analytical legal positivism. He defines a law as 'a rule laid down for the guidance of an intelligent being by an intelligent being having power over him'. Law, as such, is divorced from justice and, instead of being based on ideas of good and bad, is based on the power of a superior.[4]

For Austin, the science of jurisprudence is concerned with positive laws, as considered without regard to their goodness or badness. All positive law is derived from a clearly determinable law-giver as Sovereign. And his definition of a sovereign is : 'A determinate human superior, not in a habit of obedience to a like superior and who receives habitual obedience from a given society'. He explains that the superior may be an individual or a body or aggregate of individuals. The sovereign is not him-

self bound by any legal limitation, whether imposed by superior principles or by his own laws.

The most essential characteristic of positive law, according to Austin's theory, consists in its imperative character. Law is conceived as a command of the Sovereign. Not every type of command, however, was considered a law by Austin. Only general commands, obliging a person or persons to acts or forbearances of a class, merited the attribute of law in his opinion.[5]

'It was not necessary, in Austin's view, that a command qualifying as a law must issue directly from a legislative body of the state, such as Parliament in England. It may proceed from an official organ to which law-making authority has been delegated by the sovereign. Judge-made law, according to Austin, was positive law in the true sense of the term, since the rules which the judges make derive their legal force from authority given by the states. Such authority the state may have conferred expressly; ordinarily, however, it imparts it by way of acquiescence.[6]

In so far as Austin's theory is based upon the command of the sovereign—the sovereign being the modern state—his teaching was accepted and further developed by the leading German nineteenth century jurists, notably Rudolf von Ihering and George Jellinek. Analytical positivists from Austin onwards greatly influenced legal theory by shifting the emphasis from theories of justice to the national sovereign state as the repository and source of legal

power. Kelsen and his followers collectively known as the 'Vienna School' have remarkably restated and developed the analytical positivism of Austin.

(c) Kelsen's Pure Theory of Law

The main object of Hans Kelsen (b. 1881) in his pure theory of law is to divest the science of law of all the ideological elements. Justice, for example, is viewed by Kelsen as an ideological concept. He sees in justice an 'irrational ideal' and the pure theory of law, he maintains, cannot answer the question of what constitutes justice because this question cannot be answered scientifically at all. If justice is to be given any scientific meaningful denotation, it must be identified with legality. Justice in its restricted sense, means 'the maintenance of a positive order by conscientious application of it'.

The Pure Theory of Law, according to Kelsen, is a theory of the positive law. It endeavours to answer the question 'What is law', but not the question 'What law ought to be'. It concerns itself with law exclusively, and seeks to free the science of law from the intrusion of foreign and extraneous sciences, such as Psychology, Sociology, and Ethics. Kelsen admits that law cannot be made the object of sociological research.

Kelsen defines Jurisprudence as 'the knowledge of norms'. By the term 'norm' he understands a hypothetical judgement which declares that the doing or non-doing of a specified act will be followed by a coercive measure of the state. 'Whoever unlawfully

appropriates a chattel belonging to another, shall be punished by fine or imprisonment'. In other words, a norm signifies that under certain circumstances the state will exercise compulsion in order to enforce a certain behaviour. The law is a graduated system of such norms of compulsion; it is in its essence 'an external, compulsive order'.[7]

It is the function of legislation to determine the content of general norms and to provide organs and procedure (courts and administrative tribunals) for the execution of these norms. The agent in the process of making norms concrete is the judicial power, exercised by the courts and administrative tribunals. The adjudicating authority decides whether and in what way a general norm is to be applied to a concrete case.

Law, according to Kelsen, is a specific technique of social organization. 'Law is characterized not as an end but as a specific means, as an apparatus of compulsion to which, as such, there adheres no political or ethical value, an apparatus whose value derives rather from some end which transcends the law.'[8] The possibility of natural law is, therefore, categorically denied by Kelsen.

(d) Critics of Kelsen's Theory

Kelsen's Theory, in short, confines itself to the law as it is without regard to its justness or unjustness. But, according to Stammler, absolute purity of any theory of law is impossible. Kelsen, says he, will have to acknowledge defeat when it comes to the question

of conflicting fundamental norms. The question, which is the valid fundamental norm, his pure theory cannot avoid, for without it the whole structure would collapse.[9] From another angle, Lauterpacht, a follower of Kelsen, has questioned whether the theory of hierarchy of legal norms does not imply a recognition of natural law principles, despite Kelsen's violent attacks upon natural law ideology.[10]

While the pure theory of law points out the situations which leave a choice between alternative ideologies, such as conflicting interpretations of statutes, it refuses to give any guidance for the solution of such conflicts. Admittedly the law in such cases cannot be interpreted without reference to ideals. Further, the law, according to Austin and Kelsen, is an order backed by threats which, according to Friedmann, is the characterisation of criminal law, it ignores the principal function of law as a means of social control, outside the spheres of private litigation or prosecution. It is through the conferring of powers, not through orders backed by threats, that law makes its contribution to social life. It enables individuals to mould their legal relations with others by contracts, wills, marriages and other legal actions.

(e) Critics of Austin's Theory

Austin's characterisation of all law as command has been criticized from different quarters. Writers like Bryce, Gray, Dicey and others think that private rights, administrative acts, and declaratory laws

cannot be characterised as commands. Further Austin's theory offers no solution in the case of conflicting interpretations of a statute or of a precedent. The rigid separation of law from the ideals of justice has also been attacked by others.

(f) Pragmatic Positivism

As opposed to Austin's theory there is the American Realist movement called Pragmatic Positivism which studies law as it works and functions and not as it is on paper. It is a pragmatic approach to law, that 'of looking towards last things, fruits, consequences'.[11] As remarked by Friedmann, 'the healthy scepticism which, towards the end of nineteenth century, assailed the complacency of analytical jurisprudence took two very different forms. A new legal idealism, partly of a metaphysical, partly of a sociological, bend, set out to fight the assumption of analytical positivism and turned to investigate the realities of modern society in their relation to modern law'.[13]

Pragmatic and Analytic Positivisms are poles apart in their concepts of law. To the Analytical Positivists, law is divorced from ethics, while Pragmatic Positivists attach importance to the ethical 'good', but the essence of good, as declared by William James, is simply to satisfy demand. Roscoe Pound (b. 1870), the founder of American Sociological Philosophy is strongly influenced by James' pragmatic philosophy, for he thinks of the end of law in terms of a maximum of satisfaction of wants.

Law, according to Pragmatic Positivism, must be determined by social facts which means 'a conception of law in 'flux' and of society which changes faster than the law',[13] while Analytic Positivism stands for rigid stability in law. The Pragmatic Positivisit attaches importance to what law 'ought to be', while Austin's theory is only concerned with what law 'is'. These and other differences have rendered Positivism a theory which is self contradictory.

5

PHILOSOPHY OF LAW

(a) The Supreme End

Legal Philosophy deals with the purpose or end of law and justice is supposed to be the supreme end. Clearly, it is absolute justice which is sought after, hence the efforts of legal philosophy have been, throughout the past and the present, to find out a system of law most suitable to the attainment of absolute justice. The question is, what is justice ?

Ideals of justice have been formulated by legal thinkers in different ways and we find many diverse and discrepant theories, each claiming absolute validity. Which of these is to be accepted ? Can we discover any standard to judge their correctness ?

(b) Ideals of Justice

Let us first consider the most famous theories of justice, enunciated by Plato and Aristotle. Plato, in his Republic, fashioned a doctrine of the just commonwealth imbued with collectivistic ideals. In his view, justice consists in a harmonious relation between the various parts of the social organism. Every citizen must do his duty in his appointed place and do the thing for which his nature is best suited. Since Plato's state is a class state, Platonic

justice signifies that the members of each class must attend to their own business and not meddle with the business of the members of the other class. The rulers of the state must see to it that each person is assigned his proper station in life, and that he properly performs the duties of his station. The idea underlying this concept of justice rests on the assumption that an individual is not an isolated self, free to do whatever he likes, but a dependent member of a universal order who must subordinate his personal wishes and preferences to the organic unity of the collective whole.

Aristotle thinks of justice in a different way. Justice, in his opinion, consists in a sort of equality, and demands that the things of this world be equitably distributed and that such distribution be maintained by the law. According to this twofold function of justice, Aristotle distinguishes between two forms of justice. The first he calls distributive and the second corrective. While the first is meted out by the legislator, and consists in the distribution of offices, rights, honours, and goods to the members of the community according to the principle of proportionate equality, the second guarantees, protects, and maintains this distribution against illegal attacks. The corrective function of justice is chiefly administered by the judge and re-establishes the *status quo* by returning to the victim that which belonged to him or by compensating him for his loss.

Herbert Spencer has taken a fundamentally divergent attitude toward justice. The supreme

value he attached to the idea of justice was not equality but freedom. His famous formula is: 'Every man is free to which he wills, provided he infringes not the equal freedom of any other man'.[1] Kant has taken a similar view in using the concept of liberty for the purpose of defining the meaning of law and justice. He described law as 'the totality of the conditions under which the arbitrary will of one can coexist with the arbitrary will of another under a general law of freedom'.[2]

W. R. Sorley, a Scottish philosopher, claimed that no satisfactory theory of justice could be developed without finding a place for both equality and freedom in the scheme of societal organization. The Roman Jurist Ulpian defined justice as 'the constant and perpetual will to render to every one that to which he is entitled'. Similarly, Cicero described justice as the disposition of the mind to render to every one his due. St. Thomas Aquinas observed that justice was 'a habit whereby a man renders to each one his due by a constant and perpetual will'.[3]

In short, 'justice demands that freedom, equality, and other basic rights be accorded and secured to human beings to the greatest extent consistent with the common good'.[4] But the common good is not defined and, at the same time, it is asserted that 'justice has its dynamic and fluid components, it does not permit us to adopt stereotyped solutions for our social problems regardless of time, state of social evolution, development of productive forces, and

other contingent factors'.[5] Thus justice is always changing.

(c) Basic Types of Justice

Kelsen has attempted to reduce the many theories of justice to two basic types ; a rationalistic and a metaphysical one, the former being represented by Aristotle and the latter by Plato. He describes the rationalistic type as the one which tries to answer the question of justice by defining it in a scientific or quasi-scientific way—in a way based on reason. The metaphysical type, on the other hand, is the one realisation of which is shifted to another world beyond human experience.[6] For Kelsen, justice cannot be defined, it is an irrational ideal.

'The different schools of neo-Kantian philosophers have realised the relativity of justice and the dualism between eternal justice and positive law. They have, therefore, divorced the idea of justice from positive law. Some of them have refused to study the varying content of the idea of justice. What emerges from all these varying attempts is the failure to establish absolute standards of justice except on a religious basis'.[7]

(d) Social Control

Absolute justice, thus, appears to be unattainable, but the professed aim of legal philosophy, says Roscoe Pound, is to give us a complete and final picture of social control and to lay down a moral and legal and political chart for all time[8]. He, thus,

refers to 'perfect law' by which human relations might be ordered for ever without uncertainty and freed from need of change. The question is : What is it that makes a law perfect ? Is establishment of order alone enough ?

For Latin American legal philosopher, Louis Recasens Siches, certainty and security constitute the primary and immediate aim of the law, its 'basic motivation' ; justice, on the other hand, should be sought after by the law-makers as a more remote end. Says he : 'Law was not born into human life by reason of the desire to render tribute or homage to the idea of justice, but to fulfil an inescapable urgency for security and certainty in social life. The question of why and wherefore men make Law is not answered in the structure of the idea of justice . . . . . but in a subordinate value—security—corresponding to human need'.[9]

'There is serious doubt', says Bodenheimer, whether a social system fulfilling the requirements of order and legal certainty can be effective without the presence of a substantial ingredient of justice. If the feelings of fairness of a large part of the population are outraged by a system of law purporting to establish 'orderly' conditions of life, it will be extremely difficult for the public authorities to maintain such a legal system against attempts at evasion or subversion. Men will not stand long for an order they feel to be totally unreasonable and unbearable, and a government bent on perpetuating such an order will run into serious difficulties of enforcement. Thus an order which does not have a

substantial anchorage in justice will rest on an unsafe and precarious basis. As John Dickinson points out : 'We come upon the need for not merely a system of fixed general rules, but of rules based on justice, or in other words, on a regard for certain demands and capacities of human nature. Otherwise the system would not be workable ; offending ingrained proclivities and standards of judgment, it will be continually violated and so fail to yield the certainty which is the excuse for its existence.

'We turn next to the question of whether a system of law would be feasible which dispenses entirely with ordered regularity and certainty and concentrates its efforts solely on administering an individualized justice to the members of the community. The answer to the question must be that such a system would not be workable and has in fact never been operative in the practice of the communities or states. The human desire for normative guidance is so strong that system which abandons any and all standards of judgment and relies solely on the free and unfettered intelligence of its judges will, by its very nature, fall. Order and regularity are in another and equally significant sense essential to the accomplishment of justice.'[10]

According to Pound, 'two needs have determined philosophical thinking about law. On the one hand, the paramount social interest in the general security, which as an interest in peace and order dictated the very beginnings of law, has led men to seek some fixed basis of a certain ordering of human

action which should restrain magisterial as well as individual wilfulness and assure a firm and stable social order. On the other hand, the pressure of less immediate social interests, and the need of reconciling them with the exigencies of the general security and of making continual new compromises because of continual changes in society have called ever for readjustment at least of the details of the social order. They have called continually for overhauling of legal precepts and refitting them to unexpected situations .... These principles of change and growth, however, might easily prove inimical to the general security, and it was important to reconcile or unify them with the idea of a fixed basis of the legal order'.[11]

Perfect Law

Thus, the task undertaken by the philosophers, was, no doubt, very difficult, for, in order to make perfect law, they had to take into consideration all the above requirements of law. Pound, in his Introduction to the Philosophy of Law, observes that what was needed, in such a difficult situation, 'was some theory of the authority of law which should impose bonds of reason upon those who enacted, upon those who applied, and upon those who were subject to law'.[12] The perfect law, therefore, had to combine in itself the attributes of what it ought to be.

Thus, according to Pound, the Jurists came to the doctrine of the '*ratio legis*', the principle of natural law behind the legal rule. Natural law was

considered to be the higher and ideal law, the apparatus by which rules were to be measured, by which new rules were to be framed, and by which old rules were to be extended or restricted. But the natural law could not stand upon its own which resulted in the defeat of Legal Philosophy.

(f) Defeat of Legal Philosophy

It is interesting to note that Pound marks the events, in the sixteenth century, which gave a new turn to natural law with the result that natural law was interpreted in different terms according to the social change and lost its ideal character of a higher law. Says he :

> 'On the breakdown of the feudal social organization, the rise of commerce and the era of discovery, colonization, and exploitation of the natural resources of new continents, together with the rise of nations in place of loose congeries of vassal-held territories, called for a national law unified with in the national domain. Starkey proposed codification to Henry VIII and Dumoulin urged harmonizing and unifying of French customary law with eventual codification. The Protestant jurist theologians of the sixteenth century found a philosophical basis for satisfying these desires of the time in the divinely ordained state and in a natural law divorced from theology and resting solely upon reason, reflecting the boundless faith in reason which came with the Renaissance. Thus each national jurist might work out his own interpre-

tation of natural law by dint of his own reason, as each Christian might interpret the word of God for himself as his own reason and conscience showed the way. On the other hand, the Catholic Jurists of the Counter-Reformation found a philosophical basis for satisfying these same desires in a conception of natural law as a system of limitations on human action expressing the nature of man, that is, the ideal of man as a rational creature, and of positive law as an ideal system expressing the nature of an unified state'.[13]

Here the legal philosophy, with reason as its basis, crumbles, for natural law interpreted by each jurist according to his own reason and reason varies from man to man and place to place.

Hume has supplied a penetrating logical analysis which destroys all the pretensions of natural law to scientific validity.[14] The theory of natural law was based upon a conception of reason as a faculty inherent in all men and producing certain immutable norms of conduct. Hume made it clear that 'reason' as understood in the system of natural law confused three different things :

'(1) Inevitable and necessary truths, of which there are very few, such as certain mathematical axioms. They do not exist in the realm of human behaviour.

(2) Relations between facts or events which are normally described by 'cause and effect' because they are usually associated in a particular way, as a matter of experience

and observation. But there is no logical necessity in such association ; it is merely a matter of empirical correlation and the observation of these correlations is the object of empirical science.

(3) 'Reasonable' human conduct. Natural law theories assume that there are rational principles of behaviour which are as such of universal and necessary validity'.[15]

The above analysis shows that the conception of reason, on which the theory of natural law is based, is but a confusion of the three factors that are quite different in their meaning. Hume, therefore, rejects reason. For him, reason is merely imaginary and fictitious.

Legal Philosophy, with its aim of absolute justice, relied upon natural law which could not last long as reason, which is ever changing, formed its basis. Further, justice itself was of a fluid character and could not yield to a precise definition. Both these factors contributed to the defeat of Legal Philosophy, though it struggled hard to achieve its professed aim. This marks the difference between reason and revelation. While reason fails to achieve justice, revelation has been a perpetual source of justice and is, in fact, absolute justice, for God alone knows what is absolutely good and just for mankind. Islam, therefore, approaches justice in the manner prescribed by God and according to the light provided by revelation, for the notion of justice neither changes nor varies but remains everlasting under revelation.

PART III

ISLAMIC LAW

* Distinctive Features of Islamic Law
* Historical Sketch
* Modernism
* Philosophy of Islamic Law (Shari'ah)
* Ijtihad or Interpretation
* Ijtihad and Orthodox Caliphs
* Qiyās or Analogy
* Legal Status of Qiyās or Analogy
* Ijmā' or Consensus and Other Sources of Law
* Istihsan or Juristic Preference
* Al-Masalih al-Mursalah or Unrestricted Interests
* Rule of Necessity and Need
* Conclusion

6

DISTINCTIVE FEATURES OF ISLAMIC LAW

(a) What is Islamic Law ?

Islamic Law or Shari'ah, according to the Classical Theory is the Command of God revealed to the Prophet Muhammad (peace and blessings of Allāh be upon him). It is a divinely ordained system preceding the Islamic State and not preceded by it, controlling the Islamic Society and not controlled by it.

God alone is the Sovereign of Islamic state and in Him vests the supreme controlling power, and absolute and independent authority of state. The opening chapter of the Qur'ān, rightly called the essence of the Book, gives ua the attributes of God. 'Praise be to God, Lord of the Worlds'[1] are the words whereby God is firstly the 'Rabb' or Lord of the Worlds. The Arabic word 'Rabb' is usually translated as Lord but it is a poor substitute for the word 'Rabb' which signifies not only the Sovereign but also the Sustainer and Cherisher of the Worlds.

His Sovereignty is repeatedly asserted in the Qur'ān : The Command is for none but God's ;[2] 'And none can command except God' ;[3] 'He is the best to command' ;[4] 'His is the Sovereignty of the Heavens and the Earth' ;[5] Blessed is He in Whose Hands is the Sovereignty and He over all things hath power.'[6]

(b) Sovereignty

Sovereignty, is derived from the Latin word 'supernuus' i.e., supreme. This word is used, in Modern Political Science, to signify absolute authority. Bodin was the first to develop the concept of sovereignty. For him, sovereignty means a perpetual, humanly unlimited, and unconditional right to make, interpret, and execute law. The existence of such a right, according to him, is necessary for any well-ordered state. To Grotius, sovereignty is the supreme political power in him whose acts are not subject to any other and whose will cannot be overridden. Burges defines it as 'original, absolute, unlimited power' over the individual subject and over all associations of subjects. From what has been written by Bryce, Laski and others, the attributes of sovereignty are: 'permanance, all comprehensiveness, indivisibility, exclusiveness and absoluteness.' Austin has defined it thus : 'If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society, political and independent'.

The Sovereign of Austin is of a given society, while God is the Sovereign of the whole universe and all mankind. 'God's Sovereignty is much superior to the above definition of Austin and to all definitions that the Modern Political Science can think of. No word other than 'Rabb' can encompass the meaning of God's Sovereignty. He is at once a Sovereign,

Sustainer, Cherisher, Nourisher, Regulator, and Perfector. He alone is the Creator and the real Ruler of this universe : 'Verily His is the Creation and His is the Command'[7] ; And those who do not make their decisions in accordance with that revealed by God, are (in fact) the unjust'.[8] He cannot be compared to the Sovereigns of the World, nor is the Islamic state similar to a democracy wherein sovereignty vests in the people. It is a state ruled by Divine laws which precede it and to whose dictates it has ideally to conform.

According to Austin, law is the command of the sovereign and he defines law as 'a rule laid down for the guidance of an intelligent being by an intelligent being having power over him'.[9] Law is thus 'strictly divorced from justice and, instead of being based on ideas of good and bad, is based on the power of a superior'.[10] Austin's law, as such, may be the command of a tyrant, but God is not a tyrant. The Command of God, as the Supreme Sovereign, is no doubt, a positive law but it is not bereft of Justice, for God is most Merciful, Most Gracious and Extremely Just. He alone knows what is really good for humanity and His Just laws ensure the welfare of all.

The term 'law', according to Austin, is applied only to such rules as are enforced by the coercive power of the sovereign. Obviously, it is a view too rigid, for the intrinsic value of law lies in its notion of justice and morality and in its applicability to the entire scheme of life. Austin's positive law is, therefore, of a limited scope, while the law of God is all

embracing and universal.

Life, in Islam, is treated as an organic whole, all its parts to be governed by Islamic law, hence the conception : 'Render unto Caesar the things that are Caesar's, and render unto God the things that are God's, has no applicability to Islam. Islam is a universal religion, so are its laws.

Further, God being Merciful. His law cannot be entirely coercive. It is partly coercive and mainly corrective and persuasive. It allows time for penitence and for amendments in life. Only such crimes as are of grave nature, for example, murder, physical injury, adultery, fornication, theft, highway robbery, and wine drinking are severely punished to maintain peace and order in society.

(e) Ideal Law (Perfect and for all time)

God is the Perfect Being, so is His Law and cannot be otherwise, for in that case it would be ascribing defectiveness to God which is impossible. He is Omnipotent, Omniscient, and Omnipresent, hence His Law is all-pervading and comprehensive. 'He is the First, and the Last, He is the Manifest and the Immanent and is the Knower of all things',[11] His Law is, therefore, universal and for all time, particularly because it takes into its sweep not only this world but also the Next.

Divine Law has combined in itself, not only what law 'is' but also what law 'ought to be'. It is, in short, the 'is' and the 'ought to' of law and, thus, positive as well as ideal, and may aptly be described as 'The Positive Law in Ideal Form'.

Charles Gide and Charles Rest speak of Divine Law in the following terms :

'We may say that the 'natural order' was that order which seemed obviously the best, not to any individual whomsoever, but to rational, cultural, and liberal minded men. It was not the product of observation of external facts ; it was the revelation of the principle within. This order was supernatural and so raised above the contingencies of every day life, with its double attributes of universality and immutability. It remained the same for all times, and for all men. Its fiat was unique, eternal, it was universal in scope.'[12]

Observes Jackson :

'Islamic law finds its chief source in the will of Allāh as revealed to the Prophet Muhammad. It contemplates one community of the faithful, though they may be of various tribes and in widely separated locations. Religion, not nationalism or geography, is the proper cohesive force. The state itself is subordinate to the Qur'ān, which leaves little room for additional legislation, none for criticism or dissent. This world is viewed as but the vestibule to another and a better one for the faithful, and the Qur'ān lays down rules of behaviour toward others and toward society to assure a safe transition. It is not possible to separate political or juristic theories from the teachings of the Prophet, which establish rules of conduct concerning religious, domestic, social and political life. This results in a law of duties rather than of rights, of

moral obligation binding on the individual, from which no earthly authority can relieve him, and which he disobeys at peril of his future life'.[13]

Says Gibb :

'At the root of all Islamic political concepts lies the doctrine of the umma, the Community of Muslims. In its internal aspect, the umma consists of the totality (jama'a) of individuals bound to one another by ties, not of kinship or race, but of religion, in that all its members profess their belief in the One God, and in all their relation to Him, all are equal, without distinction of rank, class, or race. Differences of function are recognized, but 'the noblest among you is the most godfearing' (Qur'ān 49 : 13) In its external aspect, the umma is sharply differentiated from all other social organizations. Its duty is to bear witness to Allah in all the relations to its members with one another and with all mankind. They form a single indivisible organization, charged to uphold the True Faith, to instruct men in the ways of God, to persuade them to the good and to dissuade them from evil by word and deed.

'The Head of the umma is Allāh, and Allāh alone. His rule is immediate, and His Commands, as revealed to Muhammad, embody the Law and Constitution of the umma. Since God is Himself the sole Legislator, there can be no room in Islamic political theory for Legislation or legislative powers, whether enjoyed by a temporal ruler or by any kind of assembly. There can be no 'sovereign state' in

the sense that one state has the right of enacting its own law, though it may love some freedom in determining constitutional structure. The law precedes the state, both logically and in terms of time ; and the state exists for the sole purpose of maintaining and enforcing the law'.[14]

Islamic law may be best understood against its pre-Islamic background.

(d) Pre-Islamic Background

In the pre-Islamic period the unit of society was the tribe, the kinship group who claimed its descent from a common ancestor. It was to the tribe as a whole that the individual owed allegiance and it was from the tribe as a whole that he obtained the protection of his person and property.[15] The nomadic Arabs were kept down in stagnation and consequently had to rely upon the customs which grew amongst them as a result of frequent repetition of certain acts by great numbers 'acting in concert or, at least, acting in the same way when face to face with the same need'. These customs were handed down to posterity by way of tradition which had a sacred character in the social life of the pagan Arabs. 'Their rituals were not performed out of religious feeling but as traditional customs inherited from their ancestors'.[16] As Coulson observes, 'the tribe was bound by the body of unwritten rules which had evolved along with a historical growth of the tribe itself as the manifestation of its spirit and character. Neither the tribal Shaikh nor any representative assembly nad legislative power to interfere with this system'.[17]

The law of family relationship and inheritance and the whole of penal law, as stated by Shacht, was dominated by the ancient Arabian tribal system. This system implied the absence of legal protection for the individual outside his tribe, the absence of a developed concept of criminal justice and the subsumption of crimes under torts, the responsibility of the tribal group for the actions of its members and therefore unlimited vengeance for homicide, mitigated by weregild (blood money).[18]

'In the absence of any legislative authority', says Coulson, 'there did not exist any official organization for the administration of the law. Enforcement of the law was generally the responsibility of the private individual who had suffered injury. Tribal pride usually demanded that intertribal disputes be settled by force of arms, while within the tribe recourse would usually be had to arbitration. But again this function was not exercised by approved officials. A suitable *ad hoc* arbitrator (hakam) was chosen by the parties to the dispute, a popular choice being the Kahin, a priest of pagan cult who claimed supernatural powers of divination'.[19]

The settled communities of Mecca had a commercial law and those of Medina a law of land tenure. Mecca, the birth place of the Prophet was a trade centre and, according to Lammens, a Paradise of stock brokers of middle men, of bankers.[20] In Mecca there seems to have existed a system of legal administration as the public offices were divided among twelve principal tribes and oaths formed an important part of the procedure in deciding cases.

Mecca had commercial relations with South Arabia, Byzantine, Syria and Sassanian Iraq, while Medina was the chief town of agriculture. 'The customary commercial law of Mecca was enforced by the traders among themselves in much the same way as was the Law Merchant in Europe. There are some traces of agricultural contracts, which may be postulated for Medina, too. It must not be assumed, however, that the outline of the Islamic law of property, contracts, and obligations formed already part of the customary law of the pre-Islamic Arabs ; the reasoning on which this assumption was based has been invalidated by more recent research into the history of Islamic Law'.[21]

At the advent of Islam the relations of the sexes and the status of children were uncertain. Along with a regular form of marriage there existed loose unions and an Arab was permitted to take as his wife step-mother, cousin, wife's sisters and was free to release himself from the marital tie. He had an absolute power to divorce and to revoke, such divorce as and when he chose to do so. Adoption was in vogue. The right to adopt was not restricted by any condition as to the age of the adopted child, or the absence of a natural born son to the adoptive father. Female infanticide was a common feature and slavery a recognized custom.

Loans were advanced on interest, usury under the name of the 'riba' was rempant, testamentary dispositions of property were unrestricted. On the death of an Arab his property devolved on his male

heirs capable of bearing arms, all females and minors being excluded.

(e) Reforms

Islam was a revolution in that it abolished the group system based on blood ties and replaced it by the community of Faith in the One God. All abominable customs were discarded and man was reckoned as an individual with his rights and obligations. Pride of nobility and the arrogance of the times of Ignorance or Jahiliyya dwindled into insignificance as the Prophet declared that all men are equal and no one is superior to another except in point of righteousness.[22]

Society was moulded according to the Divine law. The basic concepts of civilized society such as compassion for the weaker, fairness in dealings, incorruptibility in the administration of justice were enjoined upon man. Intoxicants, riba (interest or usury), gambling and such like were forbidden. Human life was purged of all its vices and virtues prevailed. Status of women was raised and rules of inheritance laid down. All this was possible for the function of Divine Law is to build society on virtues and to raise, for this purpose, a band of 'salehin' or the righteous who enjoin right conduct and forbid indecency.[23]

Virtue and vice, good and evil cannot be rationally determined, for God alone knows what is absolutely good or absolutely evil. To know the objective good is beyond our power and this cannot be denied, for it is often

that we like a thing which is bad for us and hate a thing which is good for us ; 'Perchance ye dislike a thing which is good for you and perchance ye love a thing which is bad for you'.[24]

Man cannot know where the real good lies and in order properly to guide him human actions are classified into five categories : (1) Obligatory (fard), (2) prohibited (haram), (3) reprehensible (makruh), (4) recommended (mandub), (5) permitted or legally left indifferent (mubah). Obligatory is the demand which requires men to do something, while forbidden is the command to abstain from doing something. When the demand is not of an absolute character, the act to which it refers, if it be one of commission, is called 'recommended' or 'commendable' and if it be one to be foreborne or abstained from, it is called 'reprehensible'. An act with reference to the doing or omission of which there is no demand or, in other words, with respect to which the law-giver is indifferent, is regarded as 'permissible'. All acts which are neither obligatory, nor forbidden, nor recommended, nor condemned fall within the last category.[25]

The same is, more or less, reflected in transactions : (1) Valid (*sahih*) if both its nature (*asl*) and its circumstances (*wasf*) correspond with the law, (2) reprehensible (*makruh*) if its asl and wasf correspond with the law, but something forbidden is connected with it, (3) defective (*fasid*) if its *asl* corresponds with the law but not its *wasf*, (4) invalid (*batil*) null and void.[26]

This is how human beings are guided aright.

With its particular norms of morality Divine Law lays down universal rules of human conduct. Divine Law, as specified above, is perfect and pure, universal and for all time. This is the ideal form which the Orthodox Caliphs endeavoured to preserve, for otherwise the whole edifice of Islam would have fallen to pieces. At this stage a historical sketch will be useful to know the stages, the law passed through.

7

HISTORICAL SKETCH

(a) The Period of the Prophet A.D. 610-632

It is in the year A.D. 570, that the Prophet was born in Mecca, and received, at the age of 40 (A.D. 610), the first Divine Message :

'Read : in the name of thy Lord Who created, created man from a clot. Read : and thy Lord is the most Bounteous Who taught man what he knew not'.[1] This sheds flood of light on the importance of knowledge as it enables man to distinguish right from wrong.

The period of the Prophet commenced with the beginning of his mission in A.D. 610, and came to an end with his demise in A.D. 632. During this period the Book (The Holy Qur'ān) was the principal source of law. It was revealed by God as a guidance to the right path. The period of revelations extended over a period of 22 years, 12 of which were in Mecca before the Hijra ; and the remaining 10 in Medina. The Sunnah is the second source of law after the Qur'ān. It comprises the sayings of the Prophet, his deeds, and his tacit approval. The Qur'ān and the Sunnah are thus the primary sources of law. The Qur'ān is the Book which contains the revelations made to the Prophet in his capacity of the Messenger

of God. These revelations are, in God's own words as communicated from time to time in fragments, called *āyāt* or verses. Many of them laid down rules of law with reference to cases which actually arose. The other source of law, the Sunnah, is not only explanatory of the text of the Qur'ān but also complementary to it, for the Prophet 'never spoke of his own will unless it was a revelation revealed to him'.[2]

(b) The Period of Orthodox Caliphs, A.H. 11-40 (A.D. 632-661)

So long as the Prophet was alive the Companions of the Prophet had nothing to worry about, for he was there to guide them and meet new situations with fresh revelations. But with the passing away of the Prophet the revelations stopped and the Companions had to strive hard to extract rules of law from the text (Qur'ān and the Sunnah).

The Companions, in extracting the rules of law from these sources, followed the principles of analogy (*qiyās*) and consensus (*ijmā'*). The very first problem that confronted them was the election of Abu Bakr to Khilafat (succession to the Prophet). The Prophet having asked Abu Bakr to lead prayers before his (Prophet's) death, the Companions decided to appoint him their leader, on the analogy that he who is a leader in religious matters must also be a leader in worldly affairs. Here the cause is apparent and Abu Bakr was appointed their leader on the basis of apparent cause or strict analogy (*qiyās tām*).

The procedure they adopted to preserve the ideal form of law may be described as strict analogy (*qiyās tām*) when the cause was apparent and sound, analogy (*ta'wil*) when the cause was not apparent. *Ta'wil* was to discover the cause of the revealed rule, to be extended to similar cases, with reference to the words of the revealed rule, meaning implicit therein, context thereof, and the traditions of the Prophet, for traditions are not only explanatory to the Qur'ān but also complementary to it. The Companions did not use their own opinion or reason, for reason is only a guess, a conjecture which can hardly take the place of truth,[3] and they had in their mind the Prophet's saying: 'He who explained the Qur'ān according to his own opinion must be prepared to occupy his seat in the Fire of Hell'. The whole procedure shall be explained later, in its true perspective.

The election of Abu Bakr furnishes us with the example of analogy and consensus both, for the election was upheld by general agreement and thus attained the status of consensus. Analogy and Consensus, thus, came to be regarded as sources of law but they are subordinate to the primary or original sources, the Qur'ān and the Sunnah. Sources of Law, as such, are (1) Qur'ān, (2) Sunnah, (3) Ijmā', and (4) Qiyās. Here it may be observed that infallibility of ijmā' is proved by the saying of the Prophet: 'My followers will not agree upon an error', and an analogical deduction by a person (qualified to do so) becomes ijmā' if it is supported by general agreement

and analogy is 'an extension of law from the original text to a particular case by means of common cause or *'illa*.[4]

The period of the Orthodox Caliphs, extending over about 30 years was eventful in that there was a revolt against Islamic Faith, which was put down, with a heavy hand, by Abu Bakr.

This period may also be called the period of collection of the Qur'ān. The word 'Qur'ān' literally means reading or recitation. The sacred Book is so named because the first revelation which the Prophet received was 'to read'. A believer is, therefore, ordained to read it and understand its meaning and know what is for him and what is against him. It is a code of right conduct and an expression of the Command of God to Whose dictates society and state must ideally conform. The Book stands out, even today, as a miracle in eloquence, for none could produce a single Surah (Chapter) of the like thereof, nor could the Prophet himself have produced it so eloquently and in such a noble language, for he was unlettered. It is translated into various languages but, in the words of Pickthal, 'the result is not the glorious Koran, that inimitable symphony, the very words of which move men to tears of ecstacy—It can never take the place of the Koran in Arabic'.

There is no Book in the world like the Qur'ān in the service of which so much talent, so much labour, so much time and money have been expended and which is so minutely verified and carefully preserved. 'Though the youngest of the epoch-making

books, the Qur'ān is the most widely-read book ever written'.[5]

As stated previously, the revelations contained in this Book did not come all at once but descended in fragments as and when the need arose. The Prophet received them carefully and not only asked his followers to commit them to memory but also to reduce them to writing. This continued for about twenty-three years of his life after he was entrusted with the mission of Prophethood.

The care with which the revelations were preserved in their original purity is beyond imagination, for the Prophet himself used to recite them, in the month of Ramadan, to the full extent he received them each year, and also recited the whole of the Qur'ān twice before he breathed his last. After him, all the parchments on which it was written were collected at the suggestion of Umar to the Caliph Abu Bakr. He entrusted the task of such collection to Zaid ibn Thabit who had acted as an amanuensis to the Prophet. The task was accomplished in a few years and was verified by a committee set up by the Government for this purpose under the presidentship of the same Zaid ibn Thabit. Thus it was collected and verified under the strict supervision of the Government. And it was the Caliph Uthman who preserved and distributed copies of this carefully written edition which has been handed down to us. So the Qur'ān has come to us in the most authentic form and original purity.

The Qur'ān is addressed to mankind in general. It is a guidance sure for humanity and its principles

cover the whole sphere of life—spiritual, temporal, collective and individual. It aims at the development of personality of the individual and preserves his liberty under some restrictions in favour of the community. It contains directives for the state and the citizens alike and speaks of the best standards of morality. Above all it seeks to control society and purge it of its evils.

From the above it is evident that the verses of the Qur'ān have been collected under the state supervision but this has not been the case with the traditions of the Prophet. It cannot be denied that they were also committed to memory and even reduced to writing which is proved by the recent research. It has to be admitted that a large number of spurious sayings crept into the Hadith literature. This is mainly due to the over zealous partisans who coined and ascribed them to the Prophet to support their claims in the civil war or fitna which arose after the elective institution of the days of the Orthodox Caliphs had come to an end. But the task of sifting the authentic from the spurious was undertaken by men of great piety and learning like Imam Bukhari, Muslim, and others in the later half of the third Century of Hijra. They accepted only genuine ahadith or traditions of the Prophet on the basis of the most reliable chain of narrators called *isnad*.

(c) The Period of the Umayyads, A.H. 41-132 (A.D. 661-750)

With Ali, the fourth Caliph (d. A.H. 41), ended the period of the Orthodox Caliphs, and the first act

of the Umayyad dynasty was to remove the political centre from Medina to Damascus in Syria. The Umayyads were more worldly than spiritual in their political philosophy. As autocratic monarchs they were guided by their personal opinion in their decisions in political, economic, and diplomatic matters. A bright exception may, however, be made in favour of Umar ibn Abd al-Aziz who was noted not only for his piety but also for his wide knowledge of law and the traditions of the Prophet.

The period of the Umayyads is generally marked for the appointment of qadis or judges for the settlement of disputes with unrestricted power to decide cases according to their own personal opinion (ra'y). 'No real unifying influence was exerted by the Central Government and there was no hierarchy of superior courts whose binding precedents might have established the uniformity of a case system. Nor can it be said that the Qur'ānic laws provided a strong unifying element. Apart from this limited scope, whether or not the Qur'ānic norms were applied at all depended simply upon the degree of knowledge and piety possessed by the individual judge. But even for the pious qadis the interpretation of the Qur'ānic provisions was largely a matter of personal discretion, so that, apart from the simple and basic rules, their application often added to rather than subtracted from the prevailing diversity in legal practice'.[6]

Divine law was, here, subjected to reason which only served to deform and distort it. The Umayyads

stood condemned as rulers for their disregard of the fundamental principles of law and in consequence the Abbasids came to power in A.H. 132 (A.D. 750).

(d) The Period of the Abbasids, A.H. 132-656 (A.D. 750-1258)

The period of the Abbasids was favourable to the systematic studies in Islamic Law. It is in this period that a number of schools of law sprang up, outstanding among them being the four sunni schools, named after Abu Hanifa, Malik ibn Anas, Shafi'i, and Ahmad ibn Hanbal.

Abu Hanifa (d. A.H. 150/A.D. 767)

Nu'man ibn Thabit, known as Imam Abu Hanifa, was born in the year A.H. 80/A.D. 699 in Kufah (Iraq) and died eighteen years after the Abbasids came to power. He possessed a remarkable power of reasoning and formulated a theory called *istihsan* or juristic preferences which has come to signify a breach of strict analogy for reasons of public interest.

It may be noted here that individual reasoning in general is called opinion or *ra'y*, but when it is used by a mujtahid or qualified person, it is called ijtihad or striving to deduce rules of law. 'When it is directed towards achieving systematic consistency and is guided by the parallel of an existing institution or decision it is called qiyās or analogy, parity of reasoning. When it reflects the personal choice and discretionary opinion of the jurist, guided by his idea of appropriateness, it is called *istihsan* or *istihbab*, 'approval' or 'preference.'[7] Abu Hanifa,

who enunciated *istihsan*, is called the 'upholder of private opinion or judgment'.

In the time of Abu Hanifa, Jurists were, broadly speaking, divided into two classes. Those of Hijaz or Arabia were called the 'upholders of traditions', and those of Iraq were known as the 'upholders of private opinion'.

Malik (d. A.H. 179/A.D. 795)

Malik ibn Anas called Imam Malik was born in A.H. 95/A.D. 713 at Medina where he studied and was looked upon as the highest authority in Hadith. He was also a great jurist and the Maliki school is named after him. He learned more upon traditions and the usages of the Prophet and the precedents established by his Companions. But it must not be thought that his school was based upon a rigid traditionism.

The case was quite the reverse, and in many respects it is hard to make a distinction between the Maliki school and that of Abu Hanifa. 'Its first source was, of necessity, the Qur'ān. Then came the usage of the Prophet. This merged into the usage of successors of the Prophet and the unwritten custom of the town'.[8]

Thus Malik developed a source of law called '*al-Masalih al-Mursalah*' (unrestricted interests) and according to al-Ghazzali *istislah* (seeking the better) to distinguish it from the *istihsan* of Abu Hanifa.

Malik attached great importance to the customs of Medina on the presumption that they must have been transmitted from the time of the Prophet. Another

conception which Malik and his school developed was that of agreement or ijmā'. He would not grant power of deciding through ijmā' to the outside world, for Medina was the world for him and the agreement of Medina alone could establish catholic verity.

Shafi'i (d. A.H. 204/A.D. 819)

Muhammad ibn Idris al-Shafi'i, known as Imam Shafi'i was a pupil of Malik. He was born in Palestine in the year A.H. 150/A.D. 767 and even in early age evinced proofs of talent. He is the chief architect of Islamic Jurisprudence and his theories are noted for moderation of views and balance of judgment. His treatise on jurisprudence under the name of Risala is a monumental work which indicates his clear vision and full grasp of legal knowledge that enabled him to say what proved to be the last word in the matter. He carried technical legal thought 'to a degree of competence and mastery which had never been achieved before and was hardly equalled and never surpassed after him'.[9]

His greatness lies in striking a balance between the 'upholders of traditions' and the 'upholders of opinion'. He tries to follow a middle course between two opposite tendencies and his principle is to accept only well authorized traditions that are projected back to the Prophet. To him reliability of a tradition or lack of it depends upon 'isnad' or chain of narrators.

The dominant theme of Shafi'i's doctrine is to discourage free use of personal opinion and emphasize the authority of the Prophet as Law giver:

'Obey God and the Messenger';[10] 'Whatever the Messenger gives you, take it, and whatever he forbids, abstain from it';[11] 'Whoso obeyeth the Messenger obeyeth God'.[12] The traditions of the Prophet being divinely inspired (Nor doth he speak of (his own) desire, it is naught save an inspiration that is inspired)[13] are not only interpretive of the Qur'ānic verses but also complementary to them.

Next to the Qur'ān he stresses the Sunnah of the Prophet and argues that a Qur'ānic communication can be abrogated by another Qur'ānic communication and neither does the Qur'ān abrogate the Sunnah nor the Sunnah the Qur'ān. It is true, he goes on to argue that a Sunnah can be superseded by a Qur'ānic communication, but not until the Sunnah is first abrogated by another Sunnah laid down by the Prophet.[14]

His theory of traditions is best understood by the text of the Risala: 'Every tradition related by a reliable person as going back to the Prophet, is authoritative and can be rejected only if another authoritative tradition from the Prophet contradicts it; if it is a case of repeal of a former ordinance by a later, the later is accepted, if nothing is known about a repeal, the more reliable of the two traditions is to be followed; if both are equally reliable, the one more in keeping with the Qur'ān and the remaining undisputed parts of the Sunnah of the Prophet is to be chosen; traditions from other persons are of no account in the face of a tradition from the Prophet, whether they confirm or contradict it; if the other persons had been aware of the tradition from the Prophet, they would have followed it',[15]

The veneration in which he holds the traditions of the Prophet is manifested in this that he considers all such traditions as equally binding and when confronted with two or apparently more contradictory traditions he uses harmonizing interpretation and never considers two traditions from the Prophet contradictory if there is a way of accepting them both. When they could not be harmonized he would choose the one more in keeping with the Qur'ān and the remaining undisputed parts of the Sunnah of the Prophet.[16]

Speaking of the Qur'ān he points out that it is the basis of legal knowledge and a declaration on all matters, spiritual and temporal, which the believer is obliged to observe. He divides Qur'ānic legislation into a different set of categories. 'There are' he obesrves, 'general rules the meaning of which may be clarified by the context, and there are those only the wording of which indicates the implicit meaning'. There are general rules, he adds, which only the Sunnah can specify as general or particular.[17] This connotation of his was hailed as of supreme importance in the exegesis of the Qur'ānic Verses.

The views of Shafi'i with regard to the Sunnah of the Prophet have been discussed above. As to '*ijmā'*' (consensus) he does not define it as the agreement, on a certain point, of a few jurists of a locality or town but gives it a wider meaning to include the agreement of the entire community,[18] and this is perhaps with the object of maintaining uniformity in law. But considering the difficulty in arriving at such an agreement other scholars opposed this view of Shafi'i,

while Ghazzali worked out a *modus vivendi* by confining the unanimity of the entire community to fundamentals, leaving matters of detail to the agreement of scholars.[19]

So far as *qiyās* or analogy is concerned he confines its use to the matters of detail.[20] Shafi'i recognized in principle only strict analogical systematic reasoning to the exclusion of arbitrary opinions and discretionary decisions. To him, *ra'y* and *istihsan*, are synonymous,[21] and so is the theory of *al-Masalih al-Mursalah* enunciated by Malik.[22]

In matters which have not been provided for by the Qur'ān and the Sunnah of the Prophet, nor determined by *ijmā'* the law may be deduced, by the use of analogy, from what has been laid down by these authorities.

Shafi'i, thus, permits reasoning only through analogy or *qiyās*.[23] In his use of analogy there is a distinction to be observed. While seeking to establish a parallelism between a case that has arisen and a rule in the Qur'ān or Sunnah, which is similar in some points but not precisely parallel, his predecessors relied upon personal reason, but he would not accept such reason without some clear guide, in the context, pointing to it. Reason, therefore, must be analogical and not personal.

The final admission of *qiyās* to the 'classical' group of four usul (roots) is the result of a compromise, on the lines envisaged by Shafi'i between the old, unrestricted use of *ra'y* (or *istihsan*) and the rejection of all human reasoning in religious law.[24] The development so far described resulted in the

formulation of the classical theory based on four principles or roots: The Qur'ān, the Sunnah of the Prophet which is incorporated in the recognized traditions, the Consensus (*ijmā'*) of the scholars of the orthodox community and the method of reasoning by Analogy (*qiyās*).[25]

Ahmad ibn Hanbal (d. A.H. 241/A.D. 855).

Among the great scholars who attended Shafii's lectures was Abu Abdullah Ahmad ibn Hanbal, known as Imam Ibn Hanbal. He was born in Baghdad in A.H. 164/A.D. 780 and his reputation as traditionist and theologian is greater than as a Jurist. He adhered strictly to the traditions of the Prophet and his interpretation of them was literal. Unlike other Imams he allowed a very narrow margin to the doctrines of *ijmā'* and *qiyās*. Human reason was not, at all, acceptable to him as a source of law, divine revelation of the Qur'ān and the Sunnah of the Prophet being the only authoritative sources of law. His piety may be gleaned from the fact that he is said to have never eaten water melon because he did not come across any Prophetic precedent in this regard. Musnad is his outstanding work which contains more than 40,000 ahadith or traditions.

These are the four sunni schools of law which have survived to this day. There are several other personal schools of law such as those of Awzai (d. 157/774), of Dawud al-Zaheri (d. 270/884), and of Tabari (d. 310/923). The school of Dawud al-Zaheri relied exclusively on the literal meaning (*zahir*) of the Qur'ān and Sunnah. His theory rejected as con-

trary to religion not only the free exercise of personal opinion, which was so common before Shafi'i, but also the use of analogy advocated by Shafi'i. To the Zahiri, valid ijmā' was consensus of the Companions of the Prophet. The writings of his great follower, Ibn Hazm (d. 456/1063) disclose certain points of resemblance with the doctrine of the Hanbalis and of the traditionists in general.

The Juristic thought took a downward course with the fall of Baghdad in A.D. 1258, and it was held by the Sunni Jurists that the above four schools (represented by Abu Hanifa, Malik, Shafi'i and Ahmad ibn Hanbal) were quite sufficient. Thus the door of ijtihad or interpretation was closed and thereafter began *taqlid*, that is, following of the opinion of any of the above four schools without investigating its source. *Taqlid* continued in this form for a long time till a new movement was set afoot in the nineteenth century which marks an outright break with this old tradition. The present state is a state of violent controversy between those who prefer *taqlid* and the Modernists who press the need for new reforms.

8

MODERNISM

(a) Origin and Development

Modernism, in Islam, is in its origin, a movement against *taqlid* or blind imitation of the past which calls for ijtihad. According to the modernists ijtihad is the rational interpretation of the Qur'ān so as to satisfy the present needs of society.

The history of neo-ijtihad may be traced back to Ibn Taymiyya (d. A.D. 1328), a Hanbali scholar and one of the most indefatigable writers and preachers of Islam, who stood against uncritical acceptance of authority, or taqlid. In the words of Iqbal 'the spirit of Ibn Taymiyya's teaching found a fuller expression in a movement of immense potentialities which arose in the eighteenth century, from the sands of Najd, described by MacDonald as the 'cleanest spot in the decadent world of Islam'. It is really the first throb of life in modern Islam. To the inspiration of this movement are traceable, directly or indirectly, nearly all the great modern movements of Muslim Asia and Africa, e.g., the Sanusi movement, the Pan-Islamic movement, and the Babi movement, which only a Persian reflex of Arabian Protestantism.'[1]

Jamal al-Din al-Afghani, the exponent of Pan-Islamism and advocate of a thorough-going reform in Islam, who spent eight years (1871-1879), of his life in Egypt, made a deep impression upon one of his Egyptian pupils, Muhammad Abduhu, who rose to the position of Grand Mufti (Jurisconsult) of Egypt and following in the footsteps of his great teacher became the founder of Modernism in Egypt. The reform impulse, thus, developed but did not constitute an outright break with the past. After him his followers glided towards extremism.[2] The movement came directly under secularising influence from the West, its science, economics, and literature.

Modernists began to preach that Islam need not remain a petrified system, to be regarded as a mere encumberance to the progress of thought and that the old theological limitations of the frontiers of knowledge be set aside. There started an effort to shake off the grips of the traditional concept and recourse was had to reason and rationalism. The movement gathered further momentum and it was alleged that Islamic law, being divine in origin, was incapable of development and adaptation to modern conditions and that it was the law of the Islamic Church ; and unless it was separated from the state, just as has been done in the West, no improvement, whatsoever, was possible.[3] Modernists, now, stand for liberalism in Islam and rational re-interpretation of the Qur'ān. To them the traditions of the Prophet are out-dated and they look upon them with scant respect if they run counter to their ideas.[4] What they want is that Divine Law must conform to their

wishes. Observes Schacht :

'The method used by the modernist legislators savours of unrestrained eclecticism ; the 'independent reasoning' that they claim goes far beyond any that was practised in the formative period of Muhammadan Laws ; any opinion held at some time in the past is likely to be taken out of its context and used as an argument. On the one hand, the modernist legislators are inclined to deny the religious character of the central chapters of the sacred law ; on the other, they are apt to use arbitrary and forced interpretations of the Koran and traditions whenever it suits their purpose. Materially, they are bold innovators who want to be modern at all costs ; formally they try to avoid the semblance of interfering with the essential contents of the sacred law. Their ideals and their arguments came from the West, but they do not wish to reject the sacred law openly as Turkey has done'.[5]

(b) Present Situation

Speaking of the present situation Watt says :

'Since the beginning of the nineteenth century a third group of intellectuals has appeared in the heartlands of the Islamic world to compete with the scholar-jurists and the sufi shaykhs for control of the ideas of the masses. This is a constantly increasing group of men and women who have received Western education up to University level, and who may for short

be called the 'Westernizers'. These are the people who alone make it possible for the various Middle Eastern countries to function as modern states. They include professional men, civil servants and other administrators, businessmen, teachers, and highly skilled artisans. Because they are a new social class, they have had to struggle to gain from the rest of society an adequate recognition, both financially and politically, of their importance. Turkey decisively embarked on a Westernizing policy under Mustafa Kamal, but the other countries lagged behind. In Egypt, for example, it was only with the Revolution that the Westernizers wrested power from the old land-owning ruling class.'[6]

Such are the modernists who under the influence of the Western Society and in order to have material prosperity have gone to the extent of ignoring the very primary sources of law which, indeed, was not the intention of the early leaders of this movement as they were up only against the finality of the schools and the blind imitation of their followers. Ibn Taymiyya never conceived of a plan to undermine the foundations of Islamic Law, nor did Muhammad Abduhu think in these terms. He was not a believer in complete departure from the past. What he formulated was a basis for the interpretation of Islamic Law without breaking with its historic past,[7] but this movement in its advancement transgressed the limits and deviated from the true spirit of Islam and its laws.

(c) Christian Concept

The history of Islam and the character of Islamic Law are quite different from the Christian concept. The Theory, 'Render unto Caesar the things that are Caesar's and unto God the things that are God's' is not at all compatible with the basic notions of Islam. In Islam, law and religion, law and morals, law and the so-called 'Church' are inseparable.[8] It is this ethical value which distinguishes it from Western Laws. 'Unlike the law which Christendom inherited from Rome, therefore, Islamic Law takes into its purview relationships of all kinds, both toward God and toward men, including such things as the performance of religious duties and the giving of alms, as well as domestic, civil, economic and political institutions. By its origin, nature and purpose it is intimately bound up with the religious ethic[9]. 'In its primary function it has classified actions in terms of an absolute standard of good and evil which are not to be rationally determined, for God alone knows what is absolutely good or absolutely bad.'[10] The fact that law is of divine origin and based upon spiritual significance of life is certainly in its favour. 'It is the negation of this higher law that has brought upon this war-scarred earth untold misery and suffering'.[11]

(d) Immutability of Law

Islamic Law is, no doubt, eternal and immutable and must be so to exercise a binding force which is not subject to change. It is this which has kept

the social fabric of Islam compact and secure through the ages. Though immutable the law is yet possessed of an amazing capacity to absorb the change in life. It has broad principles which, if properly interpreted, may accommodate the needs of society.

This sort of interpretation cannot be open to the free use of arbitrary opinion or to human reason which has no regard even for the clear text of law. Human reason, varying as it is from man to man and from place to place, cannot form the basis of Shari'ah, for, if allowed, it would only serve to deform Shari'ah and disrupt the uniformity of society. And this brings us on to the Orientalists who suggest reason as the only way to modernize Shari'ah.

(e) Orientalists

There are Orientalists who criticize Shari'ah for its rigidity and say that it is devoid of positivism. Coulson in his History of Islamic Law remarks : 'The classical exposition represents the zenith of a process whereby the specific terms of the law came to be expressed as the irrevocable Will of God. In contrast with legal systems based upon human reason such a divine law possesses two major distinctive characteristics. Firstly, it is a rigid immutable system, embodying norms of an absolute and eternal validity, which are not susceptible to modification by any legislative authority. Secondly, for the many different people who constitute the World of Islam, the divinely ordained Shari'ah represents the standard of uniformity as against the variety of legal systems which would be the inevitable result if law were the

product of human reason based upon the local circumstances and the particular needs of a given community'.[12]

The Shari'ah, according to him, is not law in the modern sense of the term, when measured in terms of the two criteria of rigidity and uniformity as stated above.

In his concluding chapter he gives instances of the Muslim states which, according to him, were forced to cast aside Shari'ah and adopt Western laws on social and economic grounds. Islamic Jurisprudence, in his opinion, may successfully tackle the problem of law and society only when it is 'freed from the notion of religious law expressed in the totalitarian and uncompromising terms'.[13] For 'law to be a living force, must reflect the soul of society'.[14] What he means by these remarks is that Shari'ah must cease to be a religious law and instead of controlling society, which is its chief purpose, it should itself be controlled by society and serve its interests, and then and then alone it will be considered as law in its real sense.

Kerr, on the other hand, speaks of Shari'ah as idealistic and deprived of positivism. Says he :

> 'The revived interest of modern Muslims in the classical theory of the Caliphate and the effort to find in it the basis for 'progressive' institutions of democracy, popular sovereignty, and the like, have not only been stimulated by the political encounter between East and West over the past century but also encouraged by the publications of Orientalists'.[15]

Having thus referred to the part played by Orientalists, he states :

> 'Like the traditional doctrine of the Caliphate, traditional Jurisprudence was closely tied to its theological foundations. Here, however, we are concerned not so much with a disregard for the positive importance of institutionalizing and formally recognizing the rules of conduct, as with an insistence on minimizing the influence that human faculties can have on the content of the revealed law in the process of interpretation.
>
> 'An idealism of the kind discussed in the preceding chapter did, in fact, exist in the minds of certain pious scholars whose conception of the law was wholly bound up with its religious origins to the exclusion of its modes of application'.[16]

He, thus, finds fault with the idealist spirit of the Jurists whose primary concern in the interpretation of Shari'ah was to preserve its ideal form and avoid such methods as would distort the true substance of the revealed values.

He admits that his remarks are from the stand point of a non-Muslim : Whether or in what respects it is possible to distinguish between the affairs of this world and those of the next is a religious question to which, no doubt, it was only natural for Muslim Jurists to assume a Muslim answer. For the non-Muslim there is no reason to make such an assumption. It is legitimate for him to leave religious matters aside and examine the significance of the Shari'ah, as interpreted by men of this world, for the

affairs of this world. If he concludes that in certain areas the Shari'ah provisions are inconsistent or unverifiable or not binding except as an expression of religious truth, then he can not but believe there is something important lacking which prevents the Shari'ah from truly serving to promote the material welfare of the community'.[17]

'Both Coulson and Kerr are positivists and chiefly concerned with the material interests of society and think of Shari'ah in human terms. Shari'ah, according to them is religious, hence not a law in the modern term of the world.

(f) Law and Religion

Religion is generally conceived as entirely concerned with spiritual affairs, hence there is a tension between religion and law. Law is to cater for the social needs and, therefore, subservient to society, while religion is authoritarian as it imposes its authority upon society in order to control it and not to let it stray from its moorings, i.e., the ethical norms set by the religion. Religion insists upon morality, the distinction between right and wrong, good and evil, while worldly laws are devoted to material welfare and have little regard for ethical values. Here it may be noted that Islam is distinct from all other religions in this that it does not preach barren spirituality. The Qur'ān repeatedly assures man that all that there is in the Heavens and the Earth is to be of service to him.

The Qur'ān gives man full sanction to harness the forces of nature but makes one condition that

he must exercise his power in fairness and justice to all. Thus, Islam is a harmonious blend of the spiritual and the material both and this is fully reflected in its law which takes in its sweep not only this World but also the Next.

Positive law of which both Coulson and Kerr are advocates is divorced from justice and is also separated from ethics as we have already noticed in Chapter 4. Religious law is, in fact, moral law *par excellence* and according to Kant moral law is the law in its real sense. To Friedmann, 'there cannot be—and there never has been—a complete separation of law and morality'.[18] The law divorced from justice and morality is, therefore, no law.

In any society, says Friedmann, there is a close connection between social morality and legal order. The impact of social morality upon the legal order greatly depends upon the character of society. A liberal and pluralistic society will more easily reflect a variety of ethical values than an authoritarian one. In a custom bound society there is the gradual transformation of social behaviour into legal custom and from custom into legislative prescription, while in a highly organized society, the law becomes a major factor in the formation of social morality.[19]

(g) Islamic Society

Islamic society is well organized, for law is not only a major factor but the main factor which gives it form and shape and Islamic society has ideally to conform to the dictates of law, hence there can be no social change of disruptive or demoralized

character in Islamic society which has to proceed in accordance with the principles of morality as enunciated by Islam. Islamic society is, thus, quite different from the modern societies of almost liberal type, which reflect a variety of ethical values and throw the door wide open for all sorts of evils. Islam is the world order and seeks to reform all societies by bringing them under the control of its laws, while the Orientalists are trying not only to turn Islamic society into that of the West but also to deprive divine law of its controlling capacity.

Divine law, the command of the All-Wise God Who alone knows what is really good for mankind cannot be subservient to society, and it is in the interest of society to obey such a law as this ensures its welfare.

Further, it is interesting to note that societies vary greatly from one type to another, both historically and ideologically. 'In a theocratic or totalitarian society, the regulation of sexual practices or of freedom of discussion, even in private, may be eminently matter of 'public order', whereas in a liberal contemporary democracy, influenced by modern psychological, criminological, and sociological studies, male homosexuality carried on in private may be regarded as being of no concern to public order. The Spartans approved of homosexuality, because they believed that it promoted courage in battle. A Spartan type society might well legislate for the promotion of homosexuality, private and public, as being an important aspect of 'public order' [20]

Laws of the Modern World are of the Spartan type and the Western society is in a state of crisis. Alarmed at this, Sociology has directed its efforts to organise society on a sound and permanent basis. Happily, Islamic society is already well organised and protected but will be shattered to pieces if reason is given free reins and law is separated from morality or loses its religious character.

(h) Law and Positivism

Orientalists have to set their own house in order. Their society is corrupt and disorderly, and their laws are bad as is evident from their positive law which is divorced from justice and separated from ethics. Positivism, which they refer to as of great importance, is itself a victim to conflicts and tensions. While Analytical Positivism has shifted emphasis from theories of justice to the national sovereign as the repository and source of legal power,[21] and is a challenge to the natural law theories and metaphysical idealism,[22] Pragmatic Positivism is a 'new idealism', partly of a metaphysical, partly of a sociological bend, set out to fight the assumption of Analytical Positivism and turned to investigate the realities of modern society in its relation to modern law[23]. While Analytical Postivism is rigid, Pragmatic Positivism is fluid and thinks of law in terms of a maximum of satisfaction of wants[24]. It has its origin in the Philosophy of William James that 'the essence of good is simply to satisfy demand'[25], hence law means the law 'in flux'[26]. Positivism is, thus, self-contradictory.

Human laws are the product of reason, and, as such, imperfect and conflicting. Natural law was, therefore, adopted as a higher law and in the words of Del Vecchio, 'the criterion which permits us to evaluate Positive Law and to measure its intrinsic justice'[27], but, based on reason, it also crumbled as we have noticed in Chapter 3. Reason cannot be relied upon. It varies from time to time and is also liable to err. Laws based upon it are bound to swing backward and forward like the pendulum, while the unerring law of God alone is perfect and stable and hence to be maintained in its ideal form, or else the edifice of Islam, resting as it does upon its law, will collapse.

(i) Law and Muslim States

Orientalists argue that Muslim States, owing to the immutability of Divine Law, are following a path of legal reform and Turkey has already abandoned it in favour of the Swiss Civil Code. But they do not refer to Saudi Arabia where it has been most successful.

It may be recalled that Shari'ah is a complete scheme of life and an all embracing social order which takes into its sweep not only this world but also the Next. It deals with all the departments of life and provides directives therefor. It is, thus, an organic whole, parts of which cannot be treated in isolation from one another. To function successfully the whole scheme of Shari'ah is to be applied to human life, and then alone it demonstrates its merits. Its worth cannot be judged by adopting only a part

of it or some injunctions to the exclusion of others. Muslim states, unfortunately, did not try Shari'ah in its entirety, but applied to life only a few parts of Shari'ah and expected to reap the benefit of the whole. It is here that they failed to appreciate the intrinsic value of Shari'ah. For example, 'As to the thief, male or female, cut off his or her hand' is the Qurānic verse, which appears to be brutal, but will be considered most justified if looked at against the background of Islamic society where the rich pay the poor-due, where necessaries of life are provided by the state, where citizens enjoy equal privileges and opportunities, where hoarding is prohibited and usury forbidden, where monopolitic tendencies are curbed, and where, peace and prosperity reign supreme. Similar is the case of punishment meted out for adultery and fornication. Shari'ah prescribes a hundred stripes for the unmarried and stoning to death for the married parties to the crime. But, of course, it is applicable to a society where marriage has become easy, where promiscuity is prohibited, nude pictures and indecent literature are disallowed, and where virtue prevails and vice is condemned.

How can it be said that Shari'ah is deficient when it functioned most successfully not only in the days of Prophet and of the Orthodox Caliphs but also in the regime of umar ibn abd al-Aziz and even today in Saudi Arabia. Commenting upon Shari'ah, in his 'Fore-word to Law in the Middle East', Jackson says :

> 'But the fact is that this system which seems so unworkable to us has an amazing record of

accomplishment. Such was the cohesive and animating power of Muhammadanism that within a century of the Prophet's death his tribal people, who had no real organised state or standing army or common poli-tical ambitions had overrun the African shores of the Mediterranean, had conquered Spain, and had threatened France until the victory of Charles Martel at Poitiers in 732'.

Last but not least is the resolution unanimously adopted the conclusion of the 'Week of Islamic Law in Paris, 1951'. It explicitly stated that the discussions that took place during the Week 'demonstrated the indisputable value of the principles of Islamic Law and the fact that the variety of schools within this great juridical system implies a wealth of judicial elements and remarkable techniques, allowing this Law to respond to all needs of adaptation required by modern life' (*Travaux de la Semaine Internationale de Droit Musulman, de Louis Milliot, Parir, Institute de Droit Compare de l' Universite de Paris, 1953*).

Let us dwell awhile upon the Philosophy or purpose of Shari'ah, which distinguishes it from the laws of the modern world and proves its superiority.

9

PHILOSOPHY OF ISLAMIC LAW (SHARI'AH)

Legal Philosophy, as we have seen, takes a teleological view of law, a view that the existence of law is for the purpose and design which it has to fulfil. It cannot be denied that every system of law is oriented towards certain purposes which it seeks to implement. Islamic Law or Shari'ah is a divinely ordained system to guide mankind aright to the path of peace in this world and bliss in the Hereafter. The affairs of this world are viewed by the Lawgiver in the light of the interests of the other World, a better one and everlasting. This marks the difference between the Divine Law and the human laws which are concerned with the interests of this world alone. God is Most Gracious and Most Merciful. These attributes are fully reflected in His Law which is a gift and a mercy to His creatures. Mercy is, thus, the keynote of Shari'ah with the result that the sovereignty resting on force is reprehensible in the eyes of God. Rule by force is not the aim of Shari'ah, justice being the supreme end. Justice, according to Shari'ah is of a higher order as it is not only to give to each his due but also to be merciful and return good for ill. To do justice has been considered an act of devotion next only to belief in God.

Shari'ah is, chiefly, expressive of the attributes of God and seeks to establish peace on earth by controlling society and imparting justice to it in fairness to all. Thus, order and justice are both the principal purposes of Shari'ah.

Order alone, and without justice, renders the law tyrannical. The positive law of the modern world is concerned with order only, while the history of natural law, as expressed by Friedmann, is a tale of the search of mankind for absolute justice and of its failure as is evident from the conflicting definitions and diverse views in this regard which have rendered justice almost unattainable.

(a) Diverse Views

We have dealt with the various ideals and concepts of justice right from Plato to the present thinkers. Kelsen, as already stated, has attempted to reduce the many doctrines of justice to two basic types : rationalistic and metaphysical, the former being represented by Aristotle and the latter by Plato. And he concludes that justice is an irrational ideal which cannot be defined. The realization of metaphysical justice, according to him, 'is shifted to another world.'

The different schools of Neo-Kantian Philosophers have realised the relativity of justice and have divorced the idea of justice from positive law. Some of them have refused to study the varying content of the idea of justice as irrelevant to legal science,[2] while sociological legal philosophers have formulated ideal of justice not in absolute terms, but as relative to

civilisation[3]. Nietzsche conceives of justice as the right of the strong man—might is right. Hobbes puts forward yet another conception of justice—'But when a covenant is made, then to break it is unjust'. As such, the definition of justice is no other than the performance of covenant, while according to Hume, justice is an 'artificial virtue'. Further, justice of the Stoics treats all men as equals, as Plato's justice does not.

To Dewey, justice cannot be described in definite terms. He says that justice is generally considered to be an unchangeable virtue, yet cut-throat competition is fair and just in individualistic competitive capitalism ; right of Primogeniture is considered just, though it confers upon the eldest son the whole of the real estate of the father to the exclusion of other sons. He enumerates other cases where injustice is taken for justice such as the system of taxation, free trade, and protection etc. According to Friedmann the concept of justice, as specified above, is of necessity devoid of ideological content. The 'justice' of a given legal system may be *laissez faire* economy, or the public ownership of all productive enterprise ; it may be a parliamentary multiparty system or a non-party state ; the system may be built upon the ideology of separation of powers, or on the subordination of administration and the judiciary to the will of the legislator. It may aspire to the equality of all citizens, or to a hierarchical structure of superior and inferior citizens ; it may implement the supremacy of international over national law or—as

is the case with almost all contemporary legal systems —the inverse'.[4]

'What emerges from all these varying attempts', says Friedmann, 'is the failure to establish absolute standards of justice except on a religious basis. But religion is ultimately a matter of revelation and faith. The principles established by God must be believed in as part of one's religious faith. On the other hand, the philosophies which make knowledge of justice a matter of intuition are merely escapist. Their ultimate trust is not in everlasting principles of justice, but in the wisdom, goodness or the sheer power of men'.[5]

Absolute justice, therefore, consists in Shari'ah alone which is based on revelation and, as such, has the everlasting principles of justice. One who lives according to Divine Law does justice not only to himself but to the world around him. 'It is God Who has sent down the Book in right form with everything therein justly balanced' is the Qur'ānic verse (42 : 17). Revelation is, indeed, a balance by which to weigh all moral issues, all questions of right and wrong in conduct. While reason of varying character gave diverse and even contradictory definitions and forms to justice and, thus, failed to achieve it, revelation, with its absolute standards of justice has not only achieved it but is a never ending source of it.

Shari'ah combines in itself the 'is' and the 'ought' of law. While the 'is' stands for the stability in law, the 'ought' represents the supreme end of law which is no other than justice. Thus Shari'ah is at

once the 'is' and the 'ought' of law, that is, Positive and Ideal both.

According to Austin, 'the science of jurisprudence is concerned with positive laws, or with laws strictly so called without regard to their goodness or badness'.[6] Thus the positive law of Austin is divorced from justice while justice is the part and parcel of Shari'ah.

(b) Justice as a Sacred Trust

Justice, in Islam, has its own meaning. It is likened to a sacred trust, a duty imposed upon man to be discharged most sincerely and honestly. This is to identify one's own interests with those of others and administer the trust in all sincerity as if an act of devotion. There should be no subjective element in the definition of justice. What Islam suggests is the reflexive attitude of mind and objective approach to the problem. Justice, therefore, is the quality of being morally just and merciful in giving to every man his due. This idea is expressed by the Qur'ānic verses : 'God doth command you to render back your Trusts to those to whom they are due ; and when ye judge between man and man, to judge with fairness' ;[7] 'We have sent down to thee the Book in truth, that thou mightest judge between men as guided by God : so be not (used) as an advocate by those who betray their trust'.[8]

According to Razi and other Commentators of the Qur'ān, the word 'Trust', in the plural, comprises all sorts of trust which one has to fulfil, chief among them being 'justice', and that men in authority

should not judge according to their whims but in strict conformity with the dictates of God.[9] The above verses as explained by the Commentators point to the fact the absolute justice is known only to God, for He alone knows what is good for mankind, hence it is always safe to act as directed by God. To know the objective good is beyond our power : 'Perchance you dislike a thing which may be good for you, perchance you like a thing which may be bad for you'.[10]

There is another Qur'ānic Verse which gives us an idea of justice as distinct from injustice : God commands justice, the doing of good, and liberality to kith and kin, and he forbids all shameful deeds, and injustice and rebellion'.[11] Justice is a comprehensive term and may include all the virtues, but religion asks for something warmer and more humane, the doing of good deeds even where they are not strictly demanded by justice, such as returning good for ill and of course *a fortiori* the fulfilling the claims of those whose claims are recognized in social life. Similarly the *opposites* are to be avoided : all shameful things, every unjust act, each wicked deed.

'Things are known by their opposites'. Justice is better known by that which is injustice. The Arabic word for injustice is '*zulm*', used in various senses. For instance, in the Qur'ānic Verse (**2** : 59), it is used in the sense of transgression ; in (**4** : 64), as unjust ; in (**42** : 41), as wrong ; in (**10** : 54), as sin, while the word '*qisṭ*' implies justice. So justice is a virtue in which there is neither transgression, nor

tyranny, nor wrong, nor sin. In sum, to do justice is to undo injustice.

Here we refer to the rule of 'Sadd al-Dharai' or preventive measures adopted by Divine Law to eradicate the evils before they take root. This rule plays a significant part in providing virtue by crushing vice. It strikes at the very root of the evil and obviates the causes which give rise to it. Promiscuity, for instance, is prohibited lest it should lead to adultery. Ibn Qayyim al-Jawziya in his I'lam al-Muwaqqiin' has given several instances of this kind that prove the efficiency of Divine Law and the unique manner in which it uproots evils. Justice is, thus, established by eliminating that which causes injustice.

(c) Islamic Justice

Islamic justice, as such, is much higher than all other systems of justice, be they Greek, Roman or any other human law, for it searches the innermost motives. 'Acts are determined by motives' is a saying of the Prophet and we are to act as if in the presence of God Who is closer to us than our jugular vein and knows even what our soul whispereth to us.[12] 'To render justice', says Sarakhsi, 'constitutes one of the most noble acts of devotion.[13] According to Kasani, 'it is one of the best acts of devotion' and one of the most important duties, after belief in God'.[14]

Justice is, in fact, the bond which holds society together and transforms it into one brotherhood, every one of which, as said the Prophet, a keeper unto every other and accountable for the welfare of

all.[15] Divine Law is a strong and unbreakable rope of rescue and we are enjoined to hold in fast : 'And hold fast, all of you together, to the cable of God, and do not separate'[16] is the Qur'ānic Verse. While law is the cable of God, justice is affection and mercy to the creatures of God (community) which demands of us fulfilling all the claims that are recognized in social life.

Justice is, thus, the duty imposed by God and we have to stand firm for justice though it may be detrimental to our own interests or to the interests of those who are near and dear to us.[17] This is repeatedly asserted in the Qur'ān : 'O ye who believe ! Stand out firmly for God, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just : that is next to Piety and fear of God'.[18]

This verse refers to the real test of justice when one whom we have to do justice belongs to the people who hate us or to whom we have an aversion. Even in such circumstances we have to stand firm and discharge our duty in all sincerity.

God has commanded the believer once again to observe justice in dealing and even to speak justly when we speak : 'And come not nigh to the orphan's property, except to improve it, until he attains the age of full strength, speak justly, even if a near relation is concerned ; and fulfil the covenant of God : Thus doth God command you that ye may remember'.[19] Such is the moral law which culminates in purity of motives in inmost recesses of

heart and is for our own good to follow. Let us dwell awhile on the absolute standards of justice.

(d) Absolute Standards of Justice

What is justice ? is the question which philosophers have been debating since the fifth century B.C. It is said that justice is the chief concern of man but what justice is remains a matter of dispute not only in Philosophy but also in Ethics and in Jurisprudence.

Greek philosophers start with justice as an individual virtue, as an end or purpose of law which gives to everyone his due. In its further development we get the idea of the maintenance of that which is just and fair, a regime of establishing rights in accordance with law.

We have already noticed that according to Plato justice is the supreme virtue which is inexplicable by rational argument but consists in each individual's performance of duties assigned to him and his keeping himself within the appointed sphere. Plato calls upon everyone to exert himself to do his duty in the class in which he finds himself placed. Thus he wants to maintain the social *status quo* and prevent friction among the members of society.

Aristotle's doctrine of justice is different from that of Plato. This is a pure ideal of what law ought to be so as to render to each his own. His main contribution is the distinction between 'distributive' and 'corrective' or 'remedial justice'. The first directs the distribution of goods and honours to each according to his place in the community and orders

equal treatment of those equal before the law. The second relates to administrative law, punishment to redress wrongs and crimes and the laws to have equal application in the courts.

From the above it is evident that Plato, in his doctrine of justice, lays stress on morality, while Aristotle emphasizes the importance of law. In the later theories, most of the thinkers have gone back either to Plato or to Aristotle, hence there is the conflict of views and no compromise could be arrived at. Plato's concept of morality serves only to crush the liberty of the individual, for he has to keep himself within the class in which he finds himself placed, while Aristotle seems to stress the justice of legality or positivity in preference to any principles of good. Thus morality and law are not only at variance with each other but also misconceived with the result that there are no absolute standards of justice in the Modern Western legal thought which owes its inspiration to Greek Philosophy.

It is to the credit of Islam that it has absolute standards of justice as they are based upon the norms of vice and virtue which are supported by revelation and the fundamental principles of law. This is the distinctive feature of Islamic justice.

Justice in Islam is, thus, a happy synthesis of law and morality. It seeks not to crush the liberty of the individual but to control it in favour of society which includes the individual himself, and thus protects his legitimate interests too. Law plays its part in reconciling the interests of the individual with those of society and not *vice versa*. The in-

dividual is allowed to develop his personality with the only proviso that he should not come into conflict with the interests of society. This puts an end to friction and satisfies the claims of justice. To do justice is, therefore, to live according to the principles of Islam.

(e) Order and Peace

The Positive legal system of the modern world, as already stated above, concerns itself fulfilling the 'order' requirements only, hence proved, sometimes unworkable and for this reason abandoned and overthrown. History teaches the lesson that men will not put up with systems of law orderly to the extent of becoming tyrannical.

Divine Law is not the law of a tyrant but of God Who is Most Merciful. This attribute of God is reflected in His Law to the utmost degree. It has twofold object, spiritual benefit and social welfare ; its policy is, therefore, to encourage obedience by offering rewards. God being Oft-returning, His Law allows time for penitence and amendments in one's life. It has its own ethical norms of good and bad, virtue and vice and the assessment of all human actions and transactions according to these norms in its outstanding feature which ensures the uniformity of society.

Shari'ah has the character of a religious obligation to be fulfilled by the believer. This Law of God remains the Law of God even though there is no one to enforce it.[20] The believers even if they reside outside the territory of Islam, are bound by the law.

for the law was revealed to bind the believers as individuals wherever they may be. The law takes into consideration primarily the rights of the community ; the personal rights of the individual are protected in so far as they are not in conflict with the rights of the community.

'In order to secure order in society Shari'ah charges man with dual responsibility : One in relation to God and the other in relation to society which results in a law of duties rather than of rights, or moral obligations binding on the individual, from which no earthly authority can relieve him, and which he disobeys at the peril of his future life'.[21]

And, indeed, it is the fear of punishment in the Hereafter which has been successful in providing a deterrent, against evil, more effective than punitive legislation of the severest type, provided, of course, that faith is real and not a mere formality. 'Verily, the Qur'ān is a guidance unto those who fear God',[22] and history is replete with biographies of men who led the cleanest, purest, and noblest lives mainly due to their fear of God and of reckoning on the Day of Judgment. 'O ye who believe! Fear God as He should be feared';[23] 'And fear God that ye may prosper';[24] is the voice which reverberates and echoes in the Qur'ān.

(a) Fear of God (Taqwa)

The prosperity of society depends not so much upon the rigour of law as upon righteousness inspired by the fear of God, i.e., taqwa. And, therefore, Shari'ah is a code of moral conduct, taqwa being the

standard for the judgment of human actions: 'O mankind! surely We have created you male and female, and made you nations and tribes that you may identify each other; surely the noblest of you in the sight of God is he that fears God most.'[25]

The very idea that 'God knows what the soul of man whispereth to him and that He is closer to him than his jugular vein';[26] and 'three persons speak not privately together, but He is their fourth, nor five, but He is their sixth, nor fewer nor more, but wherever they be He is with them';[27] and that 'whether he makes known what is in his mind or hide it, He will bring him to account for it',[28] is enough to strike terror in the heart of God-fearing man and make him abstain from evil thinking, let alone evil doing.

The law, therefore, remains content with prescribing punishment for the crime of grave nature such as murder, physical injury, adultery, fornication, theft, high-way robbery, calumny, and wine drinking. For the most part, law is not coercive but corrective and persuasive.

The chief importance of the Shari'ah lies in this that it builds the mind and particularly the character of man in such a manner that he takes pleasure in doing good to others. This is most effective in establishing order and peace. Character and conduct are of nearly the same meaning. Character, according to Schopenhauer, lies in the will, and not in the intellect. Character, he says, is continuity of purpose and attitude: and these are will and a 'good will' is profounder and more reliable than a clear mind.

'Brilliant qualities of mind, according to him, win admiration, but never affection'; and 'all religions promise a reward .... for excellences of the will or heart, but none for excellences of the head'.[29] To Schopenhauer, the World is the will to live, while in Islam, the World is the will to live for others, which requires the purification of soul.

(b) Purification of Soul (Tazkiat al-Nafs)

Shari'ah believes in the purification of soul or Tazkiat al-Nafs and aims at the very heart of man which is the seat of emotions and controls the desires that are directed to the possession of some object from which pleasure is expected. Desire is often so personal that its satisfaction leads men to deviate from the right path. To control such desires has seemed more fundamental than their satisfaction, and the proverbial saying is that it is better, by far, to be a human being dissatisfied than a pig satisfied. Man, therefore, is enjoined to act with an eye on the Hereafter and the pillars of Islam—Belief in the One God, Prayers (Salāt), Fasting (Saum), Poor-due (Zakāt), and Hajj (Pilgrimage)—are contrived in such a manner that they purify the soul and divert the attention of man from selfishness to selflessness, from self-seeking to self-sacrificing.

(c) Self-Sacrifice

Self-sacrifice is and has been the main factor in establishing peace and prosperity in society, to which there is a reference in the Qur'ānic verse: 'But those who before them, had homes (in Medina) and had

adopted the Faith, show their affection to such as came to them for refuge, and entertain no desire in their hearts for things given to the (latter), but give them preference over themselves, even though poverty was their (own lot). And those saved from the covetousness of their own souls,—they are the ones that achieve prosperity'.[30]

The verse gives an account of the Ansar (the Helpers), the people of Medina who embraced Islam and accepted the Unity of God. They were so affectionate to the Meccan people of the same faith (and had come to them for refuge) that they not only gave them refuge but also showed a remarkable spirit of self-sacrifice so much so that the ties of full brothers were established between the Helpers and the Refugees (who had actually abandoned their homes and migrated to Medina for the sake of Islam). The Helpers counted it a privilege to entertain the Refugees and gave them preference over themselves though poverty was their own lot. These are, indeed, the righteous deeds which bolster up social relations.

(d) Righteousness

Such is the scheme of life envisaged by Divine Law, which wrought a great change in society by founding it on righteousness. 'Help ye one another in righteousness and piety, but help ye not one another in sin and transgression' is its call to mankind. Those who are unaware of the connotation of righteousness are apt to misunderstand Shari'ah. We, therefore, refer them to the Qur'ānic Verse : 'It is not righteousness that ye turn your faces

toward East or West; but it is righteousness—to believe in God and the Last Day, and the Angels, and the Book, and the Messengers; to spend of your substance, out of love for Him, for your kin, for orphans, for the needy, for the wayfarer, for those who ask, and for the ransom of slaves; to be steadfast in prayer, and practice regular charity; to fulfil the contracts which ye have made; and to be firm and patient, in pain (or suffering) and adversity, and throughout all periods of panic, such are the people of truth, the righteous'.[31]

The above verse is reinforced by another: 'By no means shall ye attain righteousness unless ye give (freely) of that which ye love; and whatever ye give, of a truth God knoweth it well'.[32]

The first one gives a beautiful description of the righteous and God-fearing men which Shari'ah aims to create, for society composed of such men is not only well-disciplined but also free from evils. Man has to obey salutary regulations and should fix gaze on the love of God and the love of his fellowmen. Our faith must be true and sincere and we must be prepared to express it in our deeds of help and charity to our fellowmen, for 'God doth not accept faith if it is not expressed in action, and doth not accept action if it does not conform to faith',[33] as said the Prophet. The charity, according to the second verse, is to give something that we value greatly, something that we love most. This refers to self-sacrifice and regard for others. It is altruism that should be the principle of our actions which automatically results in a good and well regulated society.

(e) Law of Equality (Qisās)

There is again the Qur'ānic Verse **(2 : 178)**, which refers to the law of equality: 'O ye who believe ! the law of equality is prescribed to you in cases of murder : the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the heir (of the slain), then grant any reasonable demand, and compensate him with handsome gratitude. This is a concession and a Mercy from your Lord. After this, whoever exceeds the limits shall be in a grave penalty'.[34] This verse is followed by another : 'In the Law of Equality there is (saving of) Life to you, O ye men of understanding'.[35]

These two verses have greatly served to foster the feelings of mercy and to mitigate the horrors of the pre-Islamic custom of retaliation. In order to meet the strict claims of justice, equality is prescribed with a strong recommendation for mercy and forgiveness. Shari'ah is a Law of Equality and of Mercy both. There should be some measure of equality in taking a life for a life ; the killing of a slave of a tribe should not ivolve a bloodfeud where many free men would be killed (as it often happened in pre-Islamic days). Hence the law of mercy, if it could be obtained by consent, with reasonable compensation, would be better. One life having been lost, many lives should not be wasted. Let the law, at most, take one life under strictly prescribed conditions, and shut the door to private vengeance or tribal retaliation. But if the aggrieved party consents, forgiveness and brotherly love is better.

The condition of consent is laid down to prevent worse evils and to keep the door of Mercy open. This is the merciful nature of Shari'ah, while, in Western laws, no felony can by compounded.

It may be noted that Islam, while recognizing retaliation as the basic principle of remedial right, favours compensation as being a principle which is most consistent with the peace and progress of society, and lays down rules for the purpose of confining retaliation within the narrowest possible limits. The theory set up is, that retaliation is not solely a private right, but that the right of the public is also mixed up in it. Hence the State takes charge of its supervision and imposes strict conditions with a view to suppress the spirit of vengeance which has been so harmful to society.

Retaliation is allowed only in cases of wilful destruction of life or limb or of such bodily injury as is capable of definite ascertainment. The law, though it recognizes retaliation in theory, discourages this form of remedy in every possible way. For example, if there be the least doubt as to the wilful character of the offence or the proof, retaliation will not be ordered. Retaliation being the right of the person injured or of his heirs, they can compound with the offender for money, or, if they chose, forgive him and to forgive is divine.

This law of qisās or equality is applicable to murder only when it is intentionally committed and not to manslaughter due to a mistake or an accident. The severe punishment meted out for murder, while it prevents bloodfeuds, is also a lesson for others not

to commit such a crime which is, indeed, saving of many lives. Shari'ah, as such, far excels other laws in its treatment of crime mercifully and also efficiently.

(f) Shari'ah—A Beacon Light

Shari'ah is, thus, a beacon light to show the way to permanent peace and order, and the Qur'ān which contains the law is rightly called a light and a Book of illumination: 'Now a light hath assuredly come to you from God and a Book of illumination, by which He will guide those who shall seek His pleasure to paths of peace, and will even, as He likes, bring them out of darkness into light and direct them to the straight path (of success in life)'.[36]

Here it may be pointed out that the Commentators hold different views as regards the Arabic word 'Noor' or light. Some take it for the 'Qur'ān', others for the 'Prophet', still others for 'Islam'. This point has been discussed by Abduhu in his Commentary of the Qur'ān called 'Manar'. He holds that this word is applicable to the Qur'ān.

A survey of the conditions prevalent before the advent of Islam discloses the fact that mankind were steeped in darkness and in sin, while justice and peace had lost their significance. The whole world was in a state of chaos and corruption: Tyranny was rampant and selfishness prevailed; the glory of Hellas had declined and the Roman's great system of law decayed; Persia played in the hands of the votaries of luxury; India was torn with castes, China

a prey to anarchism, and Arabia a centre of idolatry.

The need was felt for a legal system of universal character under God's Sovereignty, so that scattered and strayed humanity be guided aright and be formed into one brotherhood. Many were the attempts, in the past, of philosophers and thinking men to attain the unity of mankind and everlasting peace. Many were the messengers of God to spread the eternal light of God's Grace and Mercy, and manifold their forms to fulfil their mission according to the needs of the times but they were known in one place and not in another, among one people and not among others. But Muhammad (peace and blessings of Allāh be upon him) came in the fullest blaze of history, as the Last of the Prophets, with a Message, universal and for all time, from God Most High and, Most Merciful, and delivered it to mankind, in plain words, without the need of Priests and Priestcraft, the Unity of God, His Law, His Mercy and the Brotherhood of mankind.

(g) Shari'ah—a Criterion

Divine Law, according to the above verse, has come to us as a sure and unerring guide to the straight path of peace and prosperity. It gives us in clear and unequivocal terms what is right and what is wrong, what is permissible and what is forbidden. The main function of law is to provide mankind with a model behaviour and a criterion for distinction between good and evil. This is stated in the Qur'ānic verse: 'Blessed is He Who sent down the Criterion to His Servant, that it may be an admonition to al

mankind'.[37] Law, as such, is universal and for all time. As a criterion and standard for judgment it has to remain in its ideal form.

3. Antinomies

There are certain antinomies in life that have to be reconciled with. It is always safe to steer clear of the extremes in life. Shari'ah, therefore, adopts the middle course and brings about reconciliation between the antimonies which otherwise obstruct the operations of the law and thwart the promotion of peace and prosperity. So persistently has the pendulum swung backwards and forwards between certain antinomic values that we cannot but register a tension which calls for balance and harmony. Islam is the religion of peace and has a wonderful capacity to maintain equipoise in life which is fully reflected in its law with the result that all such antimonies are reconciled and set at rest.

(a) Stability and Change

According to Pound Law must be stable, yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need for change.[38] This has given rise to many theories. So far as order is concerned legal theories are inclined to stress stability rather than change. Savigny's Historical school opposes legal change. For this school the task of a jurist and a legislator is to verify and formulate existing legal customs; the function of law is essentially to stabilize, not to be an agent of

progress. Analytical positivism, by its emphasis on logic and obedience to written law, tends to regard stability and certainty as the paramount objects of legal interpretation. On the other hand, all utilitarian and sociological theories tend to emphasize the changing content of law because they see it against its social background and the needs of life. The ways to attain pleasure and avoid pain change with social circumstances, so the law must change with them.[39]

We have discussed this problem in the preceding pages. Divine Law is distinct from human laws in that it has its own method and ethical norms of good and bad which keep social change itself within bounds. Further, it is endowed with amazing capacity to reconcile stability with change.

As already explained, Divine Law has broad principles which may be interpreted, with reference to the words, meaning implicit therein, context thereof and traditions of the Prophet, to accommodate and cover the change and if anything essential is left uncovered, the Rule of Necessity and Need may be invoked to cover it. We shall illustrate this point later, in the following chapter, by examples from the Qur'ān the underlying principles of which serve to reconcile stability with change. Besides, there are other antimonies, as given below, which are to be reconciled by the legal system so as to work successfully.

(b) Reason and Revelation

Reason is the ordinary thinking faculty or power of the human mind which is supposed to be the

source of real knowledge. But it differs from man to man. For instance, see the philosophers how they contradict each other. There is perhaps not a single point on which all of them agree. They differ even about observable phenomena. Some say that substance is composed of forms, others hold that it consists of indivisible particles and still others like Democritus that it is compounded of infinitesimal particles. According to Schopenhauer, reason has no value of its own, but that 'nature has produced it for the service of the individual will'.[40] To Hume, reason is merely a slave of passions.[41] Kant in his Critique of Pure Reason, has proved the limitations of reason. Reason is liable to err and cannot be the source of knowledge, while revelation alone is the source of genuine knowledge as we have proved under Chapter 1. Revelation is the word of God, transmitted to the Prophet Muhammad (peace and blessings of Allāh by upon him), through the Angel Jibrā'il (Gabriel) whose integrity and veracity are beyond doubt.[42] Shari'ah is based upon revelation which is the only reliable source of the knowledge of things, their goodness and badness. It demands goodness and forbids evil. Real goodness cannot be rationally known. Reason is fallible and deficient, hence cannot be relied upon. Shari'ah, therefore, prefers to have analogical reasoning as a solution for the interpretation of law.

Here we refer to Shafi'i's theory which represents a compromise between the old unrestricted use of reason (or *istihsan*) and the rejection of all human reasoning. He reconciled the two schools of ex-

treme views by allowing the use of reason through analogy[43] which was admitted into classical theory[44] and claims finality. To deviate from it is to destroy the character of Shari'ah.

(c) Collectivism and Individualism

The fundamental controversy of political thought in the history of Western civilization has been that between collectivist and individualist ideals. Whether the individual or the community is the ultimate value, is a problem which was studied, from the standpoint of justice, by Greek Philosophers centuries before the Christ.

Legal theories assume one of three attitudes : Either they subordinate the individual to the community, or they subordinate the community to the individual, or they attempt to blend the two rival claims.

'Seldom has the supremacy of the community over the individual been more radically formulated than by Plato. In the Republic that supremacy is so marked that there is not only no room for private rights but not even any for private institutions such as family and property. In the Laws, the work of his old age, these institutions are recognized, but are still under strict state supervision. It is mainly the cultural background of Greek civilization and education which distinguishes Plato's ideal state from that of modern totalitarian system of government'.[45]

Modern totalitarianism asserts the supremacy of the community by the complete destruction of

individual rights. This is achieved through the abolition of the separation of powers and judicial independence, state supervision of all public and private activities. The Catholic theory of society makes the community supreme over the individual in a different manner, for he has to accept the place and function into which he is born.[46] The most outstanding of all such theories is Marxism which has completely crushed individual rights.

Hobbes stands for individualism but his doctrine leads to political absolutism. Bentham's utilitarianism, Spencer's theory of evolution all embody in different ways an individualistic philosophy but none of these theories represents perfect balance between the interests of the individual and those of society.

A synthesis between the individual liberty and the interests of society cannot be attained unless the life of society is based upon righteousness. It cannot be denied that society is but a collection of individuals, the problem is, therefore, to build the character of the individual in such a manner that, far from being injurious to society, he contributes his own good to its welfare. Shari'ah achieves this object by means of its own ethical norms of vice and virtue and with its emphasis on acquiring knowledge of one's duties to God and to society. Shari'ah is called 'Fiqh' or understanding of what is permissible and what is forbidden, what is good and what is evil. Knowledge is the only means whereby the qualities characteristic of good type are cultivated.

Of all the Divine attributes with which man

has to endue himself to discharge satisfactorily his duties, knowledge commands precedence.

'Acquire Knowledge', says the Prophet, 'it enables the possessor to distinguish right from wrong ; it lights the way to heaven ; it is our companion when friendless ; it guides us to happiness ; it sustains us in adversity ; it is a weapon against enemies and an ornament among friends. By virtue of it God exalteth communities and marketh them guides in good pursuits, and giveth them leadership ; so much so that their footsteps are followed, their deeds are imitated, and their opinions are accepted and held in respect'.[47]

It is against such background that the individual is offered full opportunities, in Islam, to develop his personality so that he may be better qualified to serve the interests of society. In consequence, there can be no clash between the interests of the individual and those of society. Thus, the individual is for society and society for the individual.

(d) Positivism and Idealism

In legal theories positivism and idealism are portrayed as opposed to each other. While idealistic theories are based upon the principles of justice and are mainly concerned with what law 'ought to be', the positivistic theories are inspired by conflicting views of law. Analytic positivism concentrates on the analysis of legal concepts and relations on the basis of a strict division of 'is' and 'ought' and is therefore divorced from justice ; as against this pragmatic positivism regards social facts as

determining legal concepts. To the former, law means the command of the sovereign and therefore 'stable', while the latter considers law as subservient to society, hence always 'in flux' – changing with every change in society. Positivism is, thus, victim to tensions and conflicts.

Further, the Analytic Positivism being divorced from justice and separated from ethics, natural law came into existence as an ideal and a higher law to serve as a standard of justice but, based on reason which is ever changing, it could not stand on its own, and ultimately broke down as we have seen under Chapter 3.

Due to separation between 'is' and 'ought to be' there could not be any reconciliation between Positive Law and Natural Law. Shari'ah, therefore, has combined in itself the 'is' and the 'ought' of law and stands for order and justice both. Being the Command of God, the Supreme Sovereign, it is positive law and, having particular regard for justice, it is ideal, hence can be rightly described as 'Positive Law in Ideal Form'.

In Shari'ah, Positivism and Idealism, in their real sense, are not only reconciled but are in perfect harmony with each other. This marks Shari'ah as superior to all other laws of the modern world. Shari'ah would work well only when its ideal form is retained, for it regulates human life and society in its own way and with its own ethical norms which are not susceptible to change ; Shari'ah is compared to a balance : 'God it is Who hath revealed the Scripture with Truth and Balance'[48] ; 'By the

soul and the balance given to it ; and its sense of discrimination and power of choosing between the wrong and the right ; happy is he who keepeth it pure and unhappy is he who corrupteth it.[49] Balance is, therefore, to be applied in the manner and as prescribed by God and not otherwise.

Meticulous observance of Shari'ah is, thus, enjoined, for it is the only standard of judgment : 'If ye differ in anything among yourselves, refer it to God and His Apostle, if ye do believe in God and the Last Day : that is best and most suitable for final determination'.[50] Finality rests with Shari'ah which implies that Shari'ah must be preserved in its ideal form and 'those who do not judge by what God hath revealed, are not only transgressors but also unbelievers and wrong doers'.[51] Let us now turn to ijtihad or interpretation of the law.

10

IJTIHAD OR INTERPRETATION

(a) Definition

Ijtihad (interpretation) in its literal sense is making an effort and technically it is an effort to discover the law from its sources. It is just the opposite of *taqlid* or imitation, i.e., following the opinions of others without scrutiny as to their sources.

(b) Legislation

Legislation, in Islam, is not law making in the modern sense of the term, for law is already contained in the text (Qur'ān and the Sunnah) and, as such, only to be enforced and extended by means of ijtihad or interpretation of the text. But such interpretation should not be the result of one's own reason or personal opinion but by analogical deduction, i.e., reasoning by way of analogy.

If the text relates to matters of religious observance and worship (*'Ibādāt*), there is no scope for legislation, because according to Ghazzali there can be no reasoning in such matters. So far as social affairs (*Mu'āmalāt*) are concerned legislation is possible in what is left legally indifferent or *mubah*, but, as indicated above, it cannot take the form of law making, for laws are already revealed by God.

It is said that the laws of the Qur'ān and the Sunnah are limited ; the possible cases are unlimited, that which is unlimited can never be covered by that which is limited. According to Ibn Qayyim al-Jawziya, this is a wrong conception, for the reasons : (1) that the acts and transactions if classified according to their categories are limited in number, and (2) if at all they are unlimited it will soon be evident that what actually takes place is limited in number and such shall be the case to the Day of Resurrection.[1]

For further illustration, he says, God and His Messenger are possessed of axiomatic expressions which cover a series of acts and transactions at one and the same time, for example, the causes which go to break one's fast, according to the Qur'ān, are limited, which means that all other causes are of no effect in this respect. Likewise, the saying of the Prophet that all intoxicants are forbidden implies that what is not intoxicant is permissible. Thus a large number is reduced to a limited number by dividing it into what is permissible, and what is not permissible, hence it cannot be said that a limited number of laws cannot govern the unlimited number of cases.

(c) Broad Principles

Besides, law consists of broad principles which cover not only the change in life but also a wide range of acts and transactions. For example, 'God has permitted trade and forbidden riba (interest or usury)'[2] is the Qur'ānic verse wherein the word 'trade'

is a general term and may well be interpreted in the light of its meaning, context and traditions or Sunnah of the Prophet to cover various commercial transactions of modern world and in case any essential transaction is left uncovered, the Rule of Necessity and Need may be invoked to cover it.

Similarly, the Qur'ānic verse 'Their affairs are (conducted) by mutual counsel',[3] refers to the principle which was applied to its fullest extent by the Prophet in his private and public life, and was fully acted upon by the Orthodox Caliphs, and may be interpreted to cover the various methods of representation in government, forms of election, eliciting of opinion, and so on.

The text (Qur'ān and Sunnah), has, in general principles, provided for problems connected with human life, in all its aspects. Law of Contract, and the economic use of wealth, for instance, may be deduced from the Qur'ānic verse: 'O ye who believe ! Eat not up your property among yourselves in vanities : but let there be amongst you traffic and trade by mutual consent : nor kill (or destroy) yourselves : for verily God hath been to you Most Merciful !'[4]

There is profound meaning in this verse. It forbids waste and encourages us to increase property by economic use (traffic and trade). We are warned that our waste may mean our own destruction (nor kill or destroy yourself). Contracts should be based upon mutual consent, which excludes from contracts such elements as fraud, false representation, duress etc.

The general theory of liability, for example, finds its expression in the Qur'ānic verses : 'Every soul will be (held) in pledge for its deeds' ;[5] 'No one shall be responsible for what one doth except himself ; and no bearer of a burden shall bear another's burden'.[6]

Every one is solely responsible for his acts and cannot transfer their consequences to someone else. He who commits a wrong is said to be liable or responsible for it. This applies to civil as well as to criminal liability.

There are also other verses which contain broad principles that admit of interpretations to provide for the growing needs of society and, thus, reconcile stability with change. Says Dr. Hartwing Hirschfield :

> 'We must not be surprised to find the Qur'ān the fountain-head of the sciences. Every subject connected with heaven or earth, human life, commerce and various trades are occasionally touched upon, and this gave rise to the production of numerous monographs forming commentaries on parts of the holy book. In this way the Qur'ān was responsible for great discussions, and to it was indirectly due marvellous development of all branches of science in the Muslim World'.[7]

Let us now deal with analogy or qiyās.

11

IJTIHAD AND ORTHODOX CALIPHS

(a) Strict Analogy (Qiyās tam)

A summary of the procedure, in the interpretation of the text (Qur'ān and Sunnah), as adopted by the Companions of the Prophet has already been given under Chapter 7. They were the first to resort to analogy when confronted with the problem of the election of Abu Bakr to Khilafat (Caliphate). As already explained, they decided to elect Abu Bakr as their leader, on strict analogy, for the cause was apparent.

The ijtihad or interpretation of the text was by way of analogy or qiyās which may be described as strict analogy if the cause was apparent, and sound analogy or tawil if the cause was not apparent. The election of Abu Bakr is an example of strict analogy or qiyās tam, and having presented this example we proceed to explain sound analogy.

(b) Sound Analogy (Tawil)

Tawil is an Arabic word used for interpretation but in its original sense it means 'to reach a thing or come to the point', that is, to probe into the inner meaning of the text and discover its intents and purposes. Bazdawi in his 'Usul' describes Tawil as

the interpretation where the possibility of doubtful meaning is dispelled by recourse to some authority or proof.[1]

Tawil has, thus, an amazing capacity to cover the growing needs of society, for the text may be interpreted with reference to its words and the meaning implicit therein, its context and the traditions of the Prophet. In this way the text is open to useful interpretations to cope with the situation and to accommodate the various needs and transactions of the modern world. And if anything essential is not covered by such interpretation, recourse may be had to the Rule of Necessity and Need. We have illustrated this point by giving example under Chapter 10.

From the above it is clear that an analogy, to be sound, must be supported by some proof and for this purpose proper understanding of not only the word and its meaning but also of the circumstances in which the text came into existence is necessary. Mujtahid (person qualified to exercise ijtihad) must, therefore, be fully equipped with the proper knowledge of Arabic, its grammar and literature, principles of jurisprudence and of the sources of law, of repealing and repealed text, of the circumstances in which the text was revealed, of the methods of ascertaining Sunnah, sufficient acuteness, sound mind, intelligence and legal acumen to be able to grasp the drift of a speech and its purpose.

Here it may be mentioned that in view of the difficulty in finding a mujtahid of these qualifications, matters may be decided according to the

theory enunciated by Ghazzali—consensus of the community on the fundamentals, leaving the matters of detail to the agreement of the scholars.[2]

According to Ibn Qayyim, tawil or interpretation by way of sound analogy is not the business of every person. Those only can do it who are well grounded or firm in knowledge (to which there is a reference in the Qur'ān itself[3]) and who have penetrating insight into the chief cause or the intention of the law giver.[4] The Prophet, for instance, did not agree with those who interpreted the Qur'ānic Verse : 'He who does evil shall be requited accordingly',[5] to mean requital in the other world alone, for the word requital or jaza, not being confined to the Day of Judgment, may also mean disease and distress in this world too.[6]

The importance of tawil may be imagined by the fact that the Prophet himself acted upon it and is said to have prayed to God to give the power of tawil to his Companions. In the case of 'Abdullah ibn 'Abbas he said : May God give him insight into the religion and instruct him in tawil.[7]

Tawil is often misunderstood by the Orientalists. To them Tawil or sound analogy is the main principle of ijtihad or interpretation of the text. They regard it as reliance on one's own judgment and say that the early jurists (i.e., Companions of the Prophet), in default of relevant text, relied on their own judgment, but this liberty of judgment later became progressively restricted to a strict process of analogical deduction. This is an erroneous view and a statement which is entirely baseless. Also, it is

derogatory to speak of the Companions of the Prophet as the ones who completely relied on their judgment, while they were the first and foremost to adopt analogical deduction to preserve the text in its ideal form. And why should they rely on their own judgment when the Qur'ān is revealed as an exposition of all things (**16** : 89) ? It is only the chief cause of the revealed rule which may be apparent or non-apparent.

The Orthodox Caliphs, if the cause was apparent they forthwith acted upon strict analogy and resorted to sound analogy only when the cause was not apparent and tried to find out the inner meaning of the text, not according to their own judgment but having regard to the word and meaning of the text, its context and traditions of the Prophet. Take the case of the Caliph 'Umar who observed the above principle in the interpretation of the Qur'ānic Verse : 'Alms are only for the poor and the needy, and those who collect them and for those whose hearts are to be reconciled, and to free the captives and the debtors, and for the cause of God and the wayfarer, a duty imposed by God.'[8] This verse relates to the distribution of alms. The words 'those whose hearts are to be reconciled', refer to a group of waverers who were included among the recipients of the alms. The verse is silent as to the cause why this group was included among the recipients of alms. It was interpreted with reference to its context.

The sole object was to win them over to the side of Islam on account of their influence and the high esteem in which they were held in their tribe.

This being the chief cause, the Caliph 'Umar refused to give them alms when Islam had gained in strength, saying : 'These were payments from the Prophet to you in order to win you over for Islam. Now, God has given power to Islam and made your support unnecessary. So you either remain faithful to Islam or the sword will be the arbitrator between us'.[9] The cause having ceased to exist the text became inapplicable. This is the case where cause was not apparent but the Caliph found it out with reference to the context.

(c) Illah (Cause) and Hikmah (Act of Wisdom)

Here it is said that this judgment of 'Umar is based upon hikmah (act of wisdom) rather than illah (cause) and, therefore, illah must be dispensed with in worldly affairs. Those who hold this view make a distinction between illah and hikmah whereas they are inseparable. Cause is the ground of action. If the action is devoid of hikmah (wisdom or sound sense) it will amount to folly which cannot apply to the Law of All-Wise God.

(d) Necessity and Need (Darura)

The procedure adopted by the Orthodox Caliphs was simple and well devised which at times seems to be a departure from the text, while, in reality it is not so, and cannot be so, because they would never venture to go against the text except under the Rule of Necessity and Need when such necessity and need arose. For this, an example is provided by the suspension of the penalty for theft in time

of famine. 'As for the thief, both male and female, cut off their hands',[10] is the Qur'ānic verse but the Caliph 'Umar suspended it in the year of Famine because of necessity and in order that people might keep alive. The consensus of jurists followed this rule.[11] Similarly workers and manufacturers such as tailors and goldsmiths were not responsible for the loss of things given to them to work upon. 'Ali argued, although the workers or the manufacturers do not seem to be responsible for the loss of such things but if there is no responsibility they will become quite negligent with the result that the owners will have to suffer a great loss. Therefore, the manufacturers and workers must be held responsible, hence 'Ali's proposal was adopted by consensus.[12]

The above is the procedure, most appropriate and best calculated to accommodate the needs of society, preserving at the same time the stability and ideal form of Shari'ah. Shafi'i, as the chief architect of jurisprudence, seems to have propounded his classical theory on the basis of the practice followed by these Caliphs and, indeed, it is the right procedure or else the unity of law and the uniformity of society would be undermined if analogy were to depend upon the free use of reason. To Shafi'i qiyās and ijtihad are two terms with the same meaning. He recognizes, in principle, only strict analogy but he is not opposed to sound analogy based upon some clear guide in the text or its context. Let us, now examine the legal position of Analogy or qiyās.

12

QIYĀS OR ANALOGY

(a) Meaning of Qiyās

The root meaning of the word qiyās is 'measuring'. The function of qiyās is to discover the cause or illah of the revealed law so as to extend it to similar cases. Wine drinking, for example, is prohibited by explicit text. The cause for the prohibition is the intoxicating effect, hence in whatever this cause is found prohibition will become applicable. Thus the law is extended to other cases of similar nature. Analogy, as we have seen under Chapter 7, was first adopted by the Companions of the Prophet while confronted with the problem of Abu Bakr's election to Caliphate. They never used their own reason or personal opinion and acted upon analogy as it preserves the text in its ideal form. The Prophet having asked Abu Bakr to lead the prayers, they elected him as their leader, for one who is the leader in religious affairs must also be the leader in worldly affairs. The cause for election is quite apparent and they were justified in electing Abu Bakr as their leader. This is the only way to preserve the purity and ideal form of Divine Law or else it will be reduced to the position of man-made

law with the result that there will be no criterion to distinguish between right and wrong.

(b) Pre-requisites of Qiyās or Analogy

The following are the pre-requisites of analogy according to the prevalent view of jurists :[1]

1. The cause must be the idea intended by the Shari'ah. It should be apparent, complete in itself.
2. The cause should be identical in both the original subject and the subject of analogy. The mere similarities in attributes are not sufficient to justify analogy.
3. The rule in the original case should be generally applicable. Thus, analogy is not permissible in case of a rule which already has a specific reference.

Article 14 of Majallah (Ottoman Civil Code), says : 'Where there is a clear text there is no room for interpretation'. This is based upon the Qur'ānic Verse : 'Assuredly conjecture can by no means take the place of truth'.[2] This means that a judge or an interpreter is bound by the text (Qur'ān and Sunnah) and is not free to resort to his own reason or opinion and to deduce a rule in conflict with the text.

'The Companions were unanimously in agreement concering the application of analogy. An example is the directive from the Caliph 'Umar to Abu Musa al-Ashari which reads : 'Know the similitudes and weigh the cases against them'. The Caliph 'Umar is also reported to have consulted the Companions

on the punishment which should be meted out to those who drink wine. 'Ali bin Abi Talib is reported to have advised: 'We apply the punishment for calumny', namely eighty lashes of the whip, because 'if a person becomes intoxicated, he knows not what he says, and in such a condition he commits calumny'. Thus through analogy, drinking of wine was linked to calumny.[3] The procedure of analogy is devised to eliminate the free use of reason and independent value judgments.

After the Companions, jurists differed over the extent to which analogy could be relied upon. The Imamiyah Shiah rejected it, Daud al-Zahiri and his followers did likewise, while the majority of jurists and the Zaydiyah Shiah accepted it.

The question of analogy has caused a good deal of controversy. The rules governing the use of analogy in making legal judgments were the cause of considerable difference of opinion among the jurists because of the scope it gave to the use of reason beyond its limits. The Malikities, for instance, claimed that the mere identity in attributes without identity of causes was sufficient ground for application of analogy. Ahmed ibn Hanbal, on the other hand, laid great stress upon even weak traditions. Let us first assess the value of human reason and see whether it can provide the basis for deduction of rules having no regard to the text or the primary sources of law.

(c) Reason

In the preceding chapters we have proved that reason is subject to change and is also unreliable. As

a natural corollary the law based upon it will result in a variety of legal systems dividing Muslim community into various sects while the purpose of Islam and its laws is to keep them united. As narrated by Ibn 'Abbas the Prophet said : 'He who explained the Qur'ān according to his opinion must be prepared to occupy his seat in the Fire of Hell'. The Caliph 'Umar, according to a narrative of al-Zuhri, pressed the point from the pulpit that the ra'y or opinion of the Prophet was right because God showed him (the right path) but our ra'y is nothing but a guess. On another occasion he asked people to be aware of the upholders of opinion because they are enemies of the traditions of the Prophet, and having failed to recollect them they base their verdicts upon opinion and thus go astray and also lead others astray. Surely, reason is unreliable and cannot be accepted unless it is supported by some guide in the text or the context.

The upholders of reason and opinion argue that the Prophet, while sending Mu'ādh ibn Jabal to Yaman as its governor, asked him on what he would depend for his legal decisions. 'On the Qur'ān, he replied. 'But if that contains nothing to the purpose? Then upon your Sunnah or traditions'. But if that also fails you' ? 'Then I will interpret according to my opinion'. And the Prophet approved his answers.

Those who rely upon this hadith fail to observe that it ends in the statement of Mu'ādh : 'I will spare no pains', which clearly indicates his intention to find out some guide in the text or its context and

not to depend entirely upon his personal opinion.

Further, is this tradition enough to sanction the free use of one's own reason or opinion? The tradition is of the mursal type (i.e. the connection with the Prophet is not mentioned).[4] According to Ibn Hazm it is not sahih or sound tradition, for it is narrated by one al-Harith ibn 'Umar al-Hazli and nobody knows who he is. Besides, it refers to the opinion of Mu'ādh who as a Companion of the Prophet would not go by his arbitrary opinion unless it was supported by some other guidance of the text or its context. It is for these reasons that Shafi'i utterly rejected the opinion which has no regard for the primary sources of law. Let us, then, see how the Orthodox Caliphs proceeded in passing their judgments, for only they can afford us correct guidance. They are called al-Rashidun or rightly guided Caliphs. They lived in the society of the Prophet and were the best authority for the knowledge of the Qur'ān and the Sunnah. They had themselves listened to the Prophet and witnessed his actions with their own eyes. And, as such, it would be best to follow in their footsteps and interpret the text as they did it.

13

LEGAL STATUS OF QIYĀS OR ANALOGY

(a) Schools of Law

All the four schools of Jurisprudence agree that in all matters which have not been provided for by the Qur'ān and the Sunnan, nor determined by consensus of opinion ; the law may be deduced from what has been laid down by any of these three authorities, by the use of Qiyās, which is generally translated as analogy.[1]

'The root meaning of the word qiyās, as already stated, is 'measuring', 'accord', and 'equality'.[2] It is defined by the Hanafites as 'an extension of law from the original text to which the process is applied to a particular case by means of a common illah, which cannot be ascertained merely by interpretation of the language of the text'.[3] To Malikites, it is 'the accord of a deduction with the original text in respect of the illah or effective cause of its law'.[4] For the Shafiites it is 'the accord of a known thing with a known thing by reason of the equality of the one with the other in respect of the effective cause of its law'.[5] To Shafi'i, qiyās and ijtihad (interpretation) are two terms with the same meaning.[6]

(b) Function of Analogy

All the above definitions point to the fact that

the function of analogy is to discover illah or efficient cause so that it may be extended to cases of similar nature. The illah that prohibits drinking of wine, for example, is its intoxicating effect, hence prohibition will be extended to all such cases where this illah is found. The function of analogy is to discover the illah.

(c) Analogical Deduction is not Law

The writers on Jurisprudence do not admit that extension of law by process of analogy amounts to establishing a new rule of law but merely helps to discover the law.[7] 'Rules of law analogically deduced do not rank as authority, as those laid down by a text of the Qur'ān, or Hadith or by consensus of opinion. The reason is that with respect to analogical deductions one cannot be certain that they are what the lawgiver intended, such deductions resting as they do upon the application of human reason which is always liable to err. In fact it is a maxim of the Sunni Jurisprudence that a Jurist may be right or may be wrong. A Qadi in deciding a case is not, therefore, bound by a particular rule of a Juristic law merely because it has the approval of certain doctors, but may follow his own view. An analogical deduction, if agreed upon by the learned as a body, assumes, however, a different legal aspect, but that is because of such agreement and not the strength of the reasons on which such collective decision may be founded'.[8]

A Jurist's fatwa is merely his opinion and not law. To give it the status of law, ijmā' or consensus

is necessary. Here are some examples to establish this point :

Drinking of wine is forbidden by the clear text of the Qur'ān but no specific punishment is prescribed for it. The Prophet punished the offenders as it suited the particular case. The Caliphs Abu Bakr and 'Umar punished the offender with forty lashes but there was no established law to this effect. In the days of the Caliph 'Uthman when the number of offenders increased, the problem was presented before the advisory council (Majlis-i-Shura) and it was suggested by 'Ali, on the analogy of calumny as specified under Chapter 12 that eighty lashes should be the punishment for this crime which was upheld by consensus and became law.[9]

In contrast to it, there is an example of 'Umar's decision that when in a murder more than one person were involved, Qisās would apply to all the accomplices. Malik and Shafi'i have adopted this view. But this decision of 'Umar, without ijmā', was not regarded as law though it was a judicial decision.[10]

(d) Sayings of the Prophet

From the above it is evident that a Jurist's fatwa and a judge's decision are not counted as law, for it is the duty of every qualified person to investigate the source from which rules have been extracted : 'And if ye have dispute concerning any matter refer it to God and the Prophet'.[11] The Prophet is reported to have said : 'Strive and make effort for each is ordained to that which he was created for' ; [12] 'If a judge interprets and gives a

right judgment he will have earned two rewards, if he interprets but errs in his judgment he will still have earned one reward',[13] the striving after knowledge is a duty upon every Muslim'.[14]

(e) Statements of the Imams

It is interesting to note that the Four Imams—Abu Hanifa, Malik, Shafi'i, and Ahmed ibn Hanbal—never advise to follow their views unless their sources are ascertained.[15]

Abu Hanifa and Abu Yusuf are reported by Ibn Qayyim al-Jawziah to have said, 'It is not legitimate for anyone to follow our views until he has learned the source wherefrom we derived those views'.

It is reported that Ma'd ibn 'Isa heard Malik say, 'I am but a human being who is capable of right and error. Consider my views carefully ; whatever is compatible with the Qur'ān and the Sunnah, accept it ; whatever is in conflict with the Qur'ān and the Sunnah set it aside'. It was on the basis of this conviction that Malik warned the Caliph Harun al-Rashid against imposing the Maliki school on the people.

Shafi'i said, 'If you come across a statement by me which runs counter to a statement by the Prophet, then follow the Prophet's statement and do not imitate me. Similarly if an authentic tradition conflicts with my school, then follow the former and know that it is my school'.

Finally Ahmad ibn Hanbal, reputedly the most

meticulous adherent to the traditions and a foe of opinion said, 'Do not imitate me, Malik, al-Shafi'i or al-Thawri, but learn from the source from which they learned'.

All these statements prove that interpretation is incumbent upon every man of learning. They also prove that the interpreter is liable to err. Caliph 'Umar's instructions to Abu Musa al-Asha'ri given in a letter are noteworthy: 'After giving judgment, if upon reconsideration you come to a different opinion, do not let the judgment which you have given stand in the way of retraction; for justice may not be disregarded, and you are to know that it is better to retract than to persist in injustice'.[16] Some have doubted the authenticity of this letter, but there are many who hold it to be authentic, beyond doubt.

A judge too is not bound by his own earlier judgment, he can retract if he realizes that his earlier view was incorrect. His decision may have a binding effect on the parties to a case in which he has passed his judgment but it cannot be considered law and courts are not bound to follow it. There is no conception of a judge-made law in Islam.

In England judicial precedents are regarded as law: 'A judicial precedent', says Salmond, 'speaks in England with authority; it is not merely evidence of the law but a source of it; and the courts are bound to follow the law that is so established'.[17] This is not, at all, applicable to the legal system of

Islam which is Divine and quite different from English law.

'Shafi'i does not reckon qiyās as one of the sources, but considers it derivative. It must be based on Qur'ān, Sunnah, or Consensus ; it cannot supersede them and is in its turn superseded by them'.[18] No further qiyas can be based on the result of a qiyās, it is ijmā' alone which gives it authenticity. Let us, then, consider what ijmā' connotes.

14

IJMĀ' OR CONSENSUS AND OTHER SOURCES OF LAW

(a) Bases of Ijmā'

Ijmā' or Consensus, the third source of Shari'ah after the Qur'ān and the Sunnah, is defined as agreement of the Muslim Jurists in a particular age on a question of law.[1] Its authority as a source of law is based on certain Qur'ānic verses and the sayings of the Prophet, chiefly the sayings : 'My followers will not agree upon an error or what is wrong' ;[2] 'What the Muslims see good, surely it is good in the eyes of God, and what the faithful think is ugly, it is also ugly in the eyes of God' ;[3] 'The hand of God is over the entire body'.[4]

Ijmā' is an essential and characteristic principle of Jurisprudence, one upon which the Muslim community acted as soon as they were left to their own resources and were called upon to solve the first and most important problem of the election of Abu Bakr to the Caliphate, after the passing away of the Prophet.

Ijmā' cannot be confined to any particular age or country.[5] To Malik, ijmā' is of the Companions of the Prophet and their successors residing at Medina. He said that Medina was the home of the Prophet

after his emigration and the abode of the Companions, that its people, therefore, were more learned than others and that their consensus should be adhered to, to the exclusion of others. Against this it is urged that men, learned in the Qur'ān, the Hadith, and the Law, dispersed to all parts of Arabia, some during the Prophet's lifetime, and others after his death. Hence it cannot be correct to say that consensus of Medina alone should be recognized. Malik's view is not accepted.[6]

The Jurists who restrict ijmā' exclusively to the Companions, contend that the saying of the Prophet 'My followers will not agree upon an error' refers to the Companions alone. But the generality of the Jurists say that the words are of general application, and there is no reason why a limited meaning should be put upon them.

Shafi'i rejects in principle the consensus of the scholars.[7] The definition of ijmā' as given by Shafi'i includes the agreement of the entire community. Considering the difficulty of arriving at such an agreement, the view of Shafi'i is opposed by others, while Ghazzali has worked out a *modus vivendi* confining unanimity of the community to the fundamentals leaving the matters of detail to the agreement of the scholars.

The Shi'ah school does not accept consensus except when it emanates from the family of the Prophet. Consensus to them 'is the consensus which embodies the views of the infallible Imam and not merely the agreement of the 'Ulema on an opinion'.[8]

(b) Function of Ijmā'

Ijma has the authority to decide whether a certain opinion of the Jurist or a decision of a Judge is right or wrong. No qiyās can attain the status of law unless it is authenticated by ijmā'. Ijmā' has been of great service to Shari'ah in eliminating personal value judgments. Ijtihad—the effort of the individual Jurist to deduce rulings from the text (Qur'ān and Sunnah) with the aid of analogical reasoning—is always subject to error, and becomes authoritative only when acknowledged by ijmā'.

Other Sources

Here it may be mentioned that there are other sources of law such as Istidlal, Istishab, Istihsan, and Al-Masalih al-Mursalah. Whereas both the latter are opposed to analogy, the former are not so.

(a) Istidlal

Istidlal is expressive of the connection that exists between one proposition and another. For example, sale is a contract and the basis of every contract is consent, therefore consent is the basis of sale. It is a sort of logical deduction and, more aptly, a striving after a basis for a rule but not the source of law though it is put forward as a source of law. Also, the three others do not deserve to be called the sources of law.

(b) Istishab

Istishab, for instance, relates to the deduction by presumption of continuity which may, at best, be

a principle of evidence rather than the source of law. The literal meaning of istishab is 'the seeking for a link' i.e. some authority or proof. Freedom from obligation, for instance, is presumed until the contrary is established. Neither istidlal nor istishab can be the sources of law but they may serve as a means to arrive at sound analogy or *tawil*, while istihsan and al-Masalih al-Mursalah fall under the Rule of Necessity and Need. We prefer to deal with these two separately so as to discuss them in some detail.

There is, practically, no need of new sources except what have been adopted and acted upon by the Orthodox Caliphs who were the closest Companions of the Prophet and had, therefore, the most intimate knowledge and understanding of the text and connotation thereof.

15

ISTIHSAN OR JURISTIC PREFERENCE

(a) Istihsan as a source of Law

All the schools are in agreement that the Qur'ān and the Sunnah are the primary and original sources of law. As is evident from the practice of the Orthodox Caliphs and the classical theory enunciated by Shafi'i, analogy (qiyās) and ijmā' (consensus) are subordinate to the original sources and have been adopted to preserve the ideal form of the original sources and to eliminate personal value judgments. In the interpretation of the text (Qur'ān and Sunnah), recourse is to be made to analogical deduction and not to the free use of reason, but Istihsan means juristic preference or the free use of reason which is opposed to analogy.

While analogy is to protect Shari'ah against the free use of reason, Istihsan an al-Masalih al-Mursalah stand for freedom in the use of one's own reason. Istihsan is the theory enunciated by Abu Hanifa who represents the school of the people of ra'y or Opinion. Istihsan means preference.

There has been a great protest against this theory by those who hold that there is no place for 'preference'. According to Ibn Qayyim, there is nothing in the Shari'ah contrary to analogy and that

what may be thought to contradict analogy is either due to the fact that the analogy is faulty or that the particular rule is not established by a text to be a part of the Shari'ah.[1]

(b) Shafi'i's View

Shafi'i rejected istihsan outright saying, 'He who practises preference assumes unto himself, the power of law making'.[2] Ra'y (one's own opinion) and istihsan are the same for Shafi'i. No one is authorized to give a judgment or a fatwa unless he bases himself on the Qur'ān, the Sunnah, or the Consensus. The Qur'ānic verse (75 : 36) declares that man is not left without guidance, but he who uses istihsan acts as if he were left without guidance and comes to whatever conclusion he pleases. Moreover the expert on question of fact is not authorized to give an arbitrary opinion, or to set aside reasoning by analogy for istihsan. 'If one were authorized to use istihsan one would have to acknowledge that others are free to use another istihsan, and there would be several right decisions and fatwas on one and the same problem'.[3]

In support of his argument Shafi'i gives an example : Supposing the governor and the mufti should say concerning a divine scourge that there is no provision for it either in a text or by analogy, and supposing they should have recourse to preference, would it not be incumbent upon them to concede to others the right to prefer some other ruling ? Consequently, every governor and mufti in the various cities would rule according to his preference and

there would be many contradictory rulings and fatawas in the same case. . . . . If one of those who would wish to discard analogy should claim that people ought to obey his decisions, then, he should be told, 'who has ordered that you be obeyed so that people become duty-bound to follow you ?' If some other person claimed such right from you, would you obey him ? Would you not say that you would only obey him whom you have been ordered to obey ? Similarly, you have no right to claim obedience from anyone. Obedience belongs only to those whom God and the Prophet have ordained that they be obeyed. Right is that which God and the Prophet have ordered to be pursued and have pointed to through a text or through deduction'.[4]

Those who support istihsan rely on the Qur'ānic verse : 'Who hear advice and follow the best thereof (ahsanahu). Such are those whom God guideth and such are men of understanding'.[5] They also quote the tradition narrated by Ibn Mas'ud : 'That which the Muslims find agreeable (hasan) is agreeable to God'. The opponents of istihsan say that there is nothing in the above-mentioned Qur'ānic verse to support the principle of preference. As for the tradition, it refers to consensus (ijmā') and not to istihsan.[6]

Commenting upon Istihsan and al-Masalih al-Mursalah, MacDonald says : Istihsan is the one that the legist, in spite of the fact that the analogy of the fixed code clearly points out to one course, 'considers it better' to follow a different one ; and the other (Al-Masalih al-Mursalah) is that under same conditions, he chooses a free course, for the sake of

the general benefit to the community'.[7] In other words both are opposed to analogy. The former is equivalent to Equity in the English sense, while the latter corresponds to Utility which forms the basis of legislation in the Modern World.

We have given the essence of Bentham's Utilitarianism under Chapter 2. Pleasure and pain are Bentham's 'law of nature'. Utility, he defines, as expressing 'the property or tendency of a thing to prevent some evil or to procure some good'. For him, good is pleasure, evil is pain.[8] Thus good and evil are linked to pleasure and pain, and the task of law is to serve utility which is out and out the sensualistic evaluation of life and not approved by Islam.

Equity in the English sense is the law administered by the Court of Chancery and as stated by Sir Henry Maine it is employed to 'override the older jurisprudence of the Country on the strength of an intrinsic ethical superiority'. Equity is, thus, 'a gloss (supplement) on the common law' filling in the gaps of the English legal system.

Could there be the need for such equity in Islam ? Is it not a fact that Shari'ah being Divine, has in it that intrinsic ethical superiority which can never be found in any form of Equity ? If there be the need for Equity, would it not be derogatory to Shari'ah.

The theory of istihsan holds no water. It is rather unbelievable that a great jurist like Abu Hanifa should enunciate a theory which discards analogy acted upon by the Orthodox Caliphs. Let us, therefore, probe deep into the very examples of

istihsan and find out what actually the case is. Here are the examples.[9]

(c) Example of Istihsan

The sale of a non-existing thing, namely a thing, which is not in existence at the time of the signing of the contract, is void. Since benefits or services, according to the Hanafi School, are not considered in existence at the time of the contract, the contract of hire was considered as the sale of a thing which is not in existence and therefore, by analogy, void. However, the contract of hire was sanctioned by the Qur'ān, the Sunnah and Consensus. All these are bases which are more substantial than analogy; thus analogy was set aside and transactions of hire were considered permissible through 'preference'.

Similarly, in a contract for manufacture and sale where a person requests another to make a certain thing for him, such as a boat, the subject-matter of the contract is a thing which is not in existence at the time of the contract, namely the thing to be manufactured. Thus, it is void by analogy. But since such contracts have been approved by the sunnah based upon the Prophet's deeds and since they have been universally accepted by the people (consensus), anology had to be abandoned, and contracts for manufacture and sale became permissible through 'preference'.

It is quite evident from these examples that they are promoted by necessity and need. The motive force behind them is to provide facilities to those who are subject to hardships. The Prophet himself

held these cases permissible under the Rule of Necessity and Need, so why not adopt the same rule instead of istihsan ?

The same appears to be the case with Al-Masalih al-Mursalah of Malik which literally means 'unrestricted interests' and denotes the principle of Utility which, as we have already explained, forms the basis of legislation in the Modern World. This principle stands for the greatest pleasure of the greatest number, while Islam preaches to seek the pleasure of God, Utilitarianism as stated above, is the doctrine of the greatest happiness as the guiding principle of conduct :

'That which is conformable to the utility or the interest of an individual is what tends to augment the total sum of his happiness. That which is conformable to the utility or the interests of a community is what tends to augment the total sum of the happiness of the individuals that compose it'.[15]

Clearly, utility aims at the gratification of desires and self-satisfaction—a principle diametrically opposed to spirit of Islam where the chief good is righteousness and self-sacrifice. Let us turn to Al-Masalih al-Mursalah.

16

AL-MASALIH AL-MURSALAH OR UNRESTRICTED INTERESTS

(a) Al-Masalih al-Mursalah as Source of Law

The word 'masalih' is the plural of 'maslaha' which means interest, benefit and when used with mursalah, it means unrestricted, undefined or, independently judged interest.

The theory of al-Masalih al-Mursalah owes its origin to the conception that Shari'ah is for social utility, and its function is to promote benefit and prevent evil. Malik approved that idea of public interest as one of the sources of the Shari'ah and named this new source al-Masalih al-Mursalah. According to MacDonald it corresponds to utility, while in the words of 'Abd al-Rahim, the author of Muhammadan Jurisprudence, it is somewhat similar to juristic equity or preference (istihsan) which has been discussed in the preceding Chapter. He says that 'Malik would allow a deduction of law to be based on general considerations of the public good. But it does not appear that the Maliki jurists took full advantage of this principle, and it would seem that many followers of that School like the Hanafi doctors consider the doctrine to be too vague and general to be useful in making legal deductions'.[1]

Ijtihad or interpretation of the text, according to this theory, is to consider the underlying or hidden meaning of the revealed text in the light of the public interest. Qiyās, as we have noticed, is the primary method of tracing the effective cause or illah of the revealed text to be extended to the cases of similar nature. If the cause is apparent, it will be admittedly extended to similar cases, but the difficulty arises when the cause is not apparent. The Orthodox Caliphs, in such a case, resorted to sound analogy or tawil and tried to discover the cause with reference to the words of the revealed text, meaning implicit therein, context thereof, and the traditions of the Prophet. But the followers of Malik's theory would resort to their method of interpreting the text according to their own reason with regard primarily to social utility. Here is the difference between the principle acted upon by the Orthodox Caliphs and the use of independent judgment by Malikites. The hidden cause which the latter discover by their own reason is but the value judgment known as 'hikmah' (act of wisdom). Thus they base their qiyās or analogy on 'hikmah' which they call the underlying reason of the text, while actually it is their own reason. Illah is thus replaced by hikmah by the Malikites.

(b) Modern Muslim Scholars

Modern Muslim scholars, says Kerr, are anxious to convey the humanism of the Shari'ah and tend to emphasize the rational comprehensibility of the hikmah and its relevance to the promotion of man's

material interest. In this process the distinction between hikmah and illah is sometimes lost, the latter term being employed to cover the meaning of the former.[2]

Here we refer to the twentieth century commentator Abdul Wahab Khallaf who emphasizes the social utility of Shari'ah. He draws a sharp difference between illah and hikmah. Illah, he says, must not only be suitable (munasib) but also objectively recognizable (zahir) and clearly defined (mundabit) ; hikmah lacks these qualifications, yet it represents the true motive for (God's) enactment of the ruling. Hikmah is the main thing and the underlying reason without which illah will serve no purpose. He, thus equates hikmah with what Qarafi (d. A.H. 684) referred to as the 'promotion of benefit'.

(c) Difference between Illah and Hikmah

In order to show the difference between the illah of a ruling and its hikmah, Khallaf gives an instance of the Qur'ānic verse : (Fasting) is for a fixed number of days, but if any of you is ill, or on a journey, the prescribed number (should be made up) from the days later'.[3] Relief from hardship, according to him, is the hikmah, while travelling or illness is the cause.[4] But he seems to ignore the fact that hikmah in this case is implicit in illah and not separate from it, because hikmah ceases to exist if the illah is taken away. Besides, illah or cause is the ground of action, if it is considered to be without hikmah it would

amount to folly which cannot be ascribed to the law of the All-Wise God. Therefore, illah covers hikmah, and the interpreter has to take into consideration illah which is the effective cause of the revealed ruling so as to extend it to similar cases. He is not primarily concerned to identify the hikmah of the ruling, but to identify the illah that occasions the ruling.

'Relying on the hikmah, furthermore, would lead to certain legal judgments contradicted by the conclusions of consensus. The prohibition of adultery, for example, might be ascribed to the hikmah of the necessity to protect genealogy ; but on this basis, it would be logical also to prohibit intermarriage between persons of unknown parentage, which by consensus is not in fact the case. The hikmah, in other words, is an unacceptable criterion for judgment because of its generality and uncertain character ; reliance on it is presumptuous and likely to lead to distortion'.[5]

(d) Classification of Interests

According to the Malikites Shari'ah is utilitarian and they attach importance to the suitability of law to the promotion of benefit (maslaha). The underlying premise is that the law should serve public interest. They classify interests or masalih under three categories : (1) Masalih mutabara or interests recognized in Shari'ah such as the protection of life, religion, family, reason, and property and some would add a sixth, namely, honour. To them, these are the interests protected by the rules of trans-

actions necessary for life, rules of worship for religion, rules of marriage for family life, punishment for the use of intoxicants to protect reasoning faculties, punishment for theft to protect property, punishment for adultery and calumny to protect honour ; (2) Masalih mulghah or interests discarded by Shari'ah, for example, the story of a ruler who breaks the Ramaḍan Fast and instead of prescribed penance of freeing a slave and distributing alms, a court jurist gives judgment that the ruler should fast for two consecutive months, since the usual penance would be of no great sacrifice for a wealthy man. This is condemned and discarded by Shari'ah ; (3) Masalih mursalah or interests ignored by Shari'ah, i.e., undefined and unrestricted interests.

The theory is named al-Masalih al-Mursalah, i.e., unrestricted interests, for it concerns itself with such interests as are ignored by Shari'ah and left undefined and unrestricted.

The problem is to determine these undefined or unrestricted interests. Instead of referring to Shari'ah, the Malikites depend upon their own reason and determine these interests with reference to social utility and the prevailing social facts which are subject to change. Shari'ah, thus, has to move with the social facts and change accordingly. It loses its stability and becomes fluid. The purpose of Shari'ah is to control society but, in this case, it is controlled by society.

Referring to the above classification of interests, the Malikite Qarafi states : 'The recognized benefit is a more reliable basis for analogy than the ignored,

uncertain one, for the latter has no logically determined 'illah but simply a presumptive or intuitive one, and hence in the strict sense is not really an analogy. Nevertheless 'We (the Maliki School) use it ; and the truth is that it is general among (all four of) the schools'.[6]

Qarafi alleges that this theory is not only a Malikite device, for it is used, at least unconsciously, by all jurists. He says :

'It is commonly said that masalih mursala is peculiar to us (i.e., the Maliki school), but if you examine the other schools you will find that when they weigh the similarities and differences between two matters, they do not seek (textual) corroboration for the consideration on the basis of which they compare and differentiate, but rather they are content with sheer suitability (munasaba), which is (none other than) masalih mursala. Thus it is found in all schools'.[7] But Qarafi cannot deny that the correct meaning of masalih mursala is more restricted than sheer suitability.

The contention of Qarafi is quite wrong for even Malik, the propounder of the theory of al-Masalih al-Mursalah does not draw analogies on this basis of sheer suitability of law to interests but under strict conditions. Let us examine the theory as enunciated by Malik.

(e) Malik's Theory

Malik is said to have approved the idea, of al-Masalih al-Mursalah (unrestricted interests) as the source of law but on examining the theory we

find three conditions attached to its adoption.[8]

First—that the case under review should be one pertaining to matters of transactions so that interests involved in it may be construed upon grounds of reason. The case should not be one relating to religious observances.

Second—that the interest should be in harmony with the spirit of the Shari'ah and should not be in conflict with any one of its sources.

Third—that the interest should be of the essential and necessary, and not of the perfectionist (luxury) type. The essential and necessary type includes the preservation of religion, life, reason, offspring and property. The perfectionist (luxury) type is one referring to 'decoration and improvement'.

Here are a few examples based upon public interests :

(1) The imposition of taxes on the rich in order to meet the costs of the army and to protect the realm.

(2) The punishment of the criminal by depriving him of property if his crime was perpetrated over that property or its equivalent.

(3) If the infidels in a war should shield themselves in their advance by Muslim prisoners of war, public interest permits the killing of the Muslim prisoners of war in the course of fighting the infidels, if such action should be found essential to contain and ward off the foe and to protect the interests of the Muslim people as a whole.

Mark the words 'if such action should be found

essential' which clearly point to the Rule of Necessity and Need. All the above examples relate to the same rule and this is further borne out by the above mentioned three conditions. The 'interest' according to the third condition should be essential and necessary. This proves, beyond doubt, that the intention of Malik in expounding this theory is to invoke the Rule of Necessity and Need, under the garb of Al-Masalih al-Mursalah.

(f) Tufi and Ghazzali

No wonder, then, if al-Tufi of Hanbali and al-Ghazzali of Shafi'i school accepted it because it is essentially a theory relating to the Rule of Necessity and Need. To Ghazzali, maslaha is not the maslaha of suitability in its unlimited sense. 'If the Shari'ah is silent on the use of masalaha in a particular situation', says Ghazzali, 'we must then distinguish between cases of necessity and need (*darurat wa hajat*) and cases in which only improvements and embellishments (*tahsinat wa tazyinat*) are in question. This distinction severely restricts the meaning of masalaha, for while it basically means 'obtaining benefit and preventing injury' these are . . . . human aims, concerned with human welfare only in human terms, whereas what we mean by maslaha is conservation of the aims of the Shari'ah. The aim of the Shari'ah in regard to man is fivefold: to conserve his religion, life, reason, offspring, and material wealth. All, then, that secures conservation of these five elements is a *maslaḥa*, and all that jeopardizes them is *mafsada*, prevention of

which is a *maslaha*. The preservation of these five interests falls within the category of necessities and is amply exemplified in the revealed laws punishing heresy, murder, wine drinking, adultery and theft'.[9]

'But when only improvements and embellishments are at stake, in the absence of support from a text or qiyās, no ruling should be given. If the Shari'ah offers no support for one's opinion, it is the same as *istihsan*, while if one of the sources does support it, then it is a case of qiyās, and the judgment is valid'.[10] Ghazzali advocated what he called *istislah* (seeking the better) but he did not claim it as a source and only sanctioned its application if the interest to be served was absolutely essential.[11]

This is, in sum, Ghazzali's view of *maslaha* which falls within the category of necessities recognized in Shari'ah. He has actually reduced *maslaha* to the necessity.

Al-Tufi, Najmuddin ibn Abd al-Qawy (d. 716 A.H.) is said to have adopted the most extreme view that public interest is the source of law and that it supersedes the explicit provision even of the revealed text. If one goes through his treatise, it becomes evident that he speaks of such interest as is essential and this amounts to necessity and naturally the law will have to give way if it comes into conflict with this sort of interest, for necessity knows no law.

His argument is based upon the saying of the Prophet : 'Do not inflict injury, nor repay one injury

with another' (*la darar wa la dirar*). He considers this to be the first principle of Shari'ah. According to him *maslaha* is to prevent injury which necessitates affording facilities to those who are confronted with hardships and this implies imperative needs.

Further, he says, if the text and ijmā' should happen to conform to the *maslaha* in a particular case, they should be applied forthwith. But if they oppose it, then 'consideration of the *maslaha* must take precedence over them. This is done through the process of restriction (*takhsis*) and clarification (*bayan*)—not by the process of attacking them—just as the Sunnah is sometimes given preference over the Qur'ān by serving as a means of clarifying it.[12] The words 'particular case', and the process of 'takhsis' and 'bayan' refer to the special nature of maslaha which is no other than imperative need and necessity. The text is published in Majmu al-Rasail fi Usul al Fiqh (Beirut, 1324 A.H.), Mustafa Zaid has discussed this point in his al-Maslaha fi Tashri' al-Islami, wa Najmuddin Tufi, Cairo, 1954.

(g) Public Interest

From the foregoing it is proved that the theories of al-Masalih al-Mursalah and Istihsan have their bases upon the doctrine of Necessity and Need. The term maslaha or interest being too vague and general cannot form the basis of a theory or scheme of law, far less be its source. Public interest, as such, can never be a source of Shari'ah, for it includes luxuries of all sorts and other

abuses of the modern world. Interest means something in which one has concern such as benefit, profit or advantage. It is not pressing as the needs and necessities are. One has to bear in mind that Islam provides facilities to those who are subject to hardships and Shari'ah takes cognizance of needs and necessities which are genuine and legitimate. To satisfy such needs and necessities the believer is allowed to overstep even the clear text of the law but he must know his responsibility to God if he does so unscrupulously.

Under the circumstances and in view of the ethical nature of Shari'ah how can it be possible to have public interest as a source of law, for it will keep the door wide open to admit what cannot be permitted under Shari'ah. To illustrate this point we cite the example of wine and swine flesh which are of great interest to the public, particulary in cold countries. Further, public in order to satisfy the sex urge is more interested in boys than in girls, for the reasons of birth control and that boys are less expensive and easily available. Hence acts have been passed sanctioning this sort of unnatural act (homosexuality). Such laws will find their way in Islam if public interest is to be the source of law. It is of interest to note that history is a record of such examples as that of Spartans who approved of homosexuality because they believed that it promoted courage in battle.[13]

It may be argued here that no such thing shall happen if essential and lawful interests are taken into consideration but how can such limitations

be imposed when the word public interest stands for all sorts of interests and if such limitations are imposed upon public interest it will turn into the same need and necessity provided for under the Rule of Necessity and Need.

Rule of Necessity and Need (and not public interest) may, therefore, be regarded as a source of law and Fitzgerald has already held it so. The theories of '*Istihsan*' and '*Al-Masalih al-Mursalah*' fall under this source and may be treated as merged in it.

(h) Modern Reformism

'Modern reformism', says Kerr, 'has sought to idenify a principle of dynamism in the Shari'ah by which to loosen the grip of rigid and all-inclusive finality that has characterised orthodox jurisprudence since the third century of Islam. This effort—strikingly represented by Rashid Rida, but also by more cosmopolitan minds such as the Lebanese Muslim lawyer Subhi Mahmassani and the former president of the Egyptian Council of State Abdarrazzaq as-Sanhuri—assumes that the great jurists of the early period of development and indeed throughout Islamic history, when properly understood, will be seen to have had a dynamic view of the Shari'ah. The element in their jurisprudence which the modernists have particularly seized upon as the basis for dynamism and humanism is the notion of *maslaha* (welfare, benefit, utility). Chief among the classical jurists cited in this regard are Al-Ghazzali (d. A.D. 1111), Ibn Taimiyya (d. A.D. 1328), and

Najm ad-Din Tufi (d. A.D. 1316). It is notable that all these three Jurists lived well after the definitive evolution of the four orthodox schools, and that both Ibn Taimiyya and Tufi held eccentric views'.[14]

But *maslaha*, in fact, is not and cannot provide the basis for dynamism, as it serves only to retard the progress of society and keeps it away from the objective good which is known to God alone, and which may be attained by living according to His Law, for the best life is that which is lived in conformity with Divine Law. The real good cannot be rationally known, for often we like a thing which is injurious to us and we dislike a thing which is beneficial to us. But modernists believe in the rational determination of good and bad and also agree in principle, with the school of utility according to which pleasure is the good. This is not the case with the jurists like Al-Ghazzali, Ibn Taimiyya and Tufi, nor did Malik think in these terms. They all used *maslaha* in the restricted sense and reduced *maslaha* to necessity and need as explained above.

In Ghazzali's 'Mustasfa' we find the fullest treatment of the doctrine of necessity as a type of *maslaha mursalah*. To him *maslaha* is necessity and not the maslaha of suitability as Qarafi stated. Says Ghazzali :

'We have restricted use of it (*maslaha*) to implementation of the purposes of the Law determined by the Qur'ān, Sunnah, and Ijmā'. Every *maslaha* that does not consist of implementing the understood intent of the Qur'ān, Sunnah, and Ijmā' is foreign and

inappropriate to the operations of the Law. It is therefore void and rejected, and whoever has recoure to it is arrogating the power of legislation, just as whoever uses *istihsan* is legislating. Every valid *maslaha* is based on implementing the intent of the Law, which must be determined by the Qur'ān, Sunnah, and Ijmā', and must not fall outside the scope of these sources'.[15]

This is the exposition of Ghazzali's view of *maslaha mursalah*. For him, *maslaha* is that which is recognised in Shari'ah, as stated before. He uses *maslaha* in the restricted sense so as to reduce it to necessity. We have dealt, at length, with the view of Malik and Tufi. Ibn Taimiyya also speaks of *maslaha* in terms of necessity and need.

In his 'Al-Hisba fi al-Islam' (administration of market), Ibn Taimiyya refers to needs and necessities as the factors which gave rise to such administration. His work 'al-Siyasa al-Sharia' points to the same, needs and necessities as *maslaha* and Ibn Qayyim's 'al-Turuq al-Hukmiyya' is in no way different from it. Not only these jurists but almost all other jurists have used *masalih* in the restricted sense to mean needs and necessities.

(i) Change in Fatwa (Verdict)

Ibn Qayyim is alway referred to as one who attaches great importance to public interest. It is said that he advocates the change in fatwa (verdicts) because of a change in time, place and circumstances and this is based upon a story related to him by his teacher Ibn Taimiyya. He (Ibn Taimiyya)

is reported to have said : I passed with some of my companions, in the days of the Tartars, by a group of them who were drinking alcohol. One of my companions wanted to reprimand them, but I prevented him from doing so and said God has prohibited strong drinks as they divert people from God and prayer, but strong drinks here divert these people from murder, capture of children and plunder, so leave them alone'.[16] Strong drinks in this case were overlooked not in the public interest but in view of the pressing need to save the people from murder and plunder.

Here it may be profitable to note that Ibn Qayyim, by using the word public interest, means nothing else than the needs of people and has actually stated such interest to be *'hajat'* or need in answer to which, he says, even *riba al-fadal* becomes permissible.[17]

The word 'need' means 'constraint or compulsion' exercised upon or by persons. Need may also arise from the facts or circumstances of a case, so the above story related by Ibn Taimiyya has its bearing upon the need and necessities of a particular case. And it is in answer to this need and necessity that he allowed the Tartars continue drinking alcohol. It may also be said that in this case, 'the lesser of the two evils is preferred'. Thus allowance is given to need and necessity, Ibn Taimiyya did not change the law but deviated from it under the Rule of Necessity and Need.

With regard to fatwa (verdict) it may be said that it is an effort to extract rules from the text and not an established law as has been explained

under Chapter 13. Fatwa is only the opinion of the Jurist which may change but the text (Qur'ān and the Sunnah) cannot change.[18]

Mahmassani has given several examples, in his Falsafa al-Tashri' fi al-Islam (translated into English by Farhat J. Ziadeh), of changing Fatawi, but, he says, that 'the dominant view of Jurists would not accept any violation of a Koranic or Sunnah text, and would not justify any change therein on account of a change in circumstances. This view, in fact, prohibited *fatwas* contrary to the texts and restricted the admissibility of customs, and the concession to hardships, only to matters not provided for in the texts. Imam Abu Hanifa and his companion Muhammad, Imam Shafi'i, Da'ud al-Zahiri and others adhered to this view.[19] Thus, Imam Shafi'i is reported to have said : If I narrate a tradition of the Prophet and I do not act in accordance with it, then know that my mind has departed from me'.[20] Ibn Hazm similarly rejected deparature from the text upon a plea of change in time, place or condition.[21]

'In spite of this dominant view', says he 'there have been some Caliphs, Imams and Jurists who endorsed the possibility of change in the explanation or the interpretation of the texts because of a change in their causes or in the customs upon which they were based, or in answer to necessity and public interest'.[22] But no such interpretation can attain the status of law unless it is authenticated by ijmā'. Further, his argument is plausible. The examples which he has presented to prove the possibility of

change in the law are such as have their bearing on the Rule of Necessity and Need which becomes applicable to cases where meticulous observation of law results in injury and where according to Ghazzali, all prohibited things become permissible by necessity.[23] The Rule of Necessity and Need does not change the law but accommodates the change. Thus no change, whatsoever, can affect the law. If changes in times, places, and circumstances were to affect the law, it would not have survived to this day. Those who recognize change in law, are unaware of the fact that, in this way, they admit that the law is imperfect, while, according to the Qur'ān it is perfect : 'This day have I perfected your religion for you, completed My favours upon you' (5 : 4). As is Islam, so is its law. Those who assume change in the Divine Law, think of it in human terms. Divine law is perfect and for all time : 'No change wilt thou find in God's Ways (Laws)'.[24] God's Law cannot be imperfect, for it would, then, be ascribing imperfection to God Himself.

Change in the causes or customs does not change the law. What appears to be the change in law is only the deviation from it under the need and necessity as we have noticed in the case of Ibn Taimiyya who overlooked drinking of alcohol by the Tartars, for the situation demanded such connivance. Such deviations are presented as changes but, in fact, they are not changes in law, for the law being eternal and for all time cannot change but remains the same to be applicable when the situation changes or things revert to their former and original position

or fresh situations arise requiring the application of the same law.

(j) Law of God cannot change

God's Law, be it remembered, can never change. 'No change wilt thou find in God's Law' (35 : 43). There are several Qur'ānic verses to prove this fact and above all is the Qur'ānic Verse : 'And if in anything you differ, refer it to God and the Apostle, if ye do believe in God and the Last Day : That is best, and most suitable for final determination'.[25] How can the law change when the finality of determination rests with the text and the text, as a standard of judgment, has to remain in its ideal form ? Thus neither the text nor the law can change. The main purpose of law, as specified above, is to control society, and if law becomes liable to change, it will lose it purpose and the society its uniformity. And why should the law change when it can accommodate the change. We repeat it again that broad principles are contained in the law, which if interpreted with reference to its words, meaning implicit therein, context thereof, and the traditions of the Prophet, can meet, as declared Shafi'i, every eventuality in life, and if anything essential is left uncovered the Rule of Necessity and Need may be invoked to cover it. This was the procedure adopted by the Orthodox Caliphs which worked most successfully in their days, and later in the regime of 'Umar bin 'Abd al-Aziz, and works even today in Saudi Arabia.

Modernists are unaware of the Divine quality of Shari'ah which in its unique way reconciles stability

with change. No human laws can be compared to it, for they are the product of reason, hence a bundle of never ending contrarieties and conflicts. The positivism to which the Orientalists often refer is, as already explained, composed of the analytic on the one hand and the pragmatic on the other, each diametrically opposed to the other. While analytic positivism lays stress on the stability of law, pragmatic positivism emphasizes the fluidity in law. To pragmatic positivism, law means law 'in flux', as it is determined by social facts which are always changing. Western society is, thus, in a state of crisis which is proved by the fact that sociology has directed its efforts to organize society on a stable and uniformed basis. What a pity ! our modernist scholars are blind to these hard facts and wish to destroy the unity of Shari'ah and the uniformity of society. Misguided by the Orientalists, who have no profound knowledge of Shari'ah, nor can they appraise its value, Modernists have devoted themselves to preach *maslaha* as the basis for dynamism. They little know what harm they are doing to Shari'ah, for *maslaha* or public interest is a loose term and of vague and uncertain character and to act upon it is to determine Shari'ah by social facts which would certainly reduce it to the position of man-made law.

(k) Recent Research

We have before us the works of three Muslim scholars — 'Al-Maslaha fi al-Tashri' al-Islami wa Najmuddin Tufi' (Public Interest in Shari'ah and

Najmuddin Tufi) by Mustafa Zaid, Cairo 1954 ; 'Dawabit al-Maslaha fi al-Shariat al-Islamia' (Regulations regarding public interest in Shari'ah) by Muhammad Saeed Ramaḍan al-Buti, Damascus, 1966-1967 ; Nazriat al-Maslaha fi al-Fiqh al-Islami (Theory of Public Interest in Shari'ah) by Husain Hamid Hassan, Cairo 1971.

Mustafa Zaid's work is a dissertation which he submitted to Cairo University for a Master's Degree. He deals with masalih or interests not in their generality and uncertain nature but as recognized by Shari'ah. He has listed a series of interests endorsed by Shari'ah to show that they touch upon every aspects of life. They are, in fact, needs and necessities of men as provided by Shari'a.[26] The major part of this work is concerned with Tufi, his life, and his theory of maslaha.

Saeed Ramadan's work is a thesis which he submitted to al-Azhar University for a Doctor's Degree. The characteristic feature of this work is that he has laid down rules for the determination of maslaha. Clearly, the effective way to preserve Shari'ah in its ideal form is to determine maslaha by the needs recognized in Shari'ah otherwise Shari'ah would be reduced to the position of man-made laws. There are several Qur'ānic verses which enjoin upon us strict compliance with the prescribed principles in determining the maslaha : 'And judge between them by what God hath revealed, and follow not their vain desires, diverging from the Truth that hath come to thee' ;[27] 'We have sent down to thee, the Book in truth, that thou mightest judge between

men, as guided by God : so be not (used) as an advocate by those who betray their trust' ;[28] 'If ye differ in anything among yourselves, refer it to God and His Apostle.[29] 'If any do fail to judge by (the light of) what God hath revealed, they are (no better than) unbelievers'.[30]

The rules laid down by Saeed Ramadan, at the end of his work, may be summed up as : (1) Nothing of the Qur'ān or Sunnah is permitted to be particularized by independently judged maslaha, for a text from the Qur'ān can be explained only by a similar text or authentic Sunnah as Sunnah can only be explained by a similar Sunnah or a text from the Qur'ān. A *maslaha* which is not derived from the Qur'ān and Sunnah cannot be regarded as *maslaha*. (2) It is incorrect to take a dictum of certain Jurists that 'laws change according to the times' on its face value, for what has been proved by the Qur'ān and Sunnah or analogy based on them is ever lasting. Had it been subject to change, the law would have ceased to exist long ago. What the Jurists meant by their dictum refers only to those laws which are based upon customs, for such laws have to change, under necessity, according to the changing customs, and (3) every one who tries to interpret the text must take into consideration the important points, referred to above, with regard to maslaha in Shari'ah, so that he may not confuse maslaha with what the protagonists of modernism claim to be maslaha.[31]

It may be noted that Saeed Ramaḍan uses the word maslaha in the restricted sense so as to mean 'ḥajat'[32] (needs).

Husain Hamid Hassan's work also is a thesis submitted to Cairo University for a Doctor's Degree. In his introduction to this work he says : 'This theory is based upon two principles, first, that the excellence and superiority of Shari'ah lies in this that it provides for the needs of society and interests of the community, and secondly, that the text contains all the *masalih* or interests and it is incumbent upon the interpreter, in the absence of explicit text, to discover and determine *masalih* or interests by what is consistent (mulaim) with the text and the intention of the law giver'.

He admits in his introductory notes, that all human needs and interests are incorporated into Shari'ah and *masalaha* or interest is that which is stated in the text and no *maslaha* can take precedence over the text. This is in consonance with the view of Shafi'i who holds that Shari'ah, i.e. Divine Law is a declaration on all matters and provides for every possible eventuality in life and this is the claim advanced by the Qur'ān itself : 'And We have revealed to thee a Book as an exposition of all things' ;[33] 'We have neglected nothing in the Book' ;[34] 'There is nothing fresh nor dry, but is to be found in the revealed Book' ;[35] 'And in whatsoever, ye differ, the verdict therein belongs to God.'[36] Islam is perfect,[37] so is its law.

With regard to the various ways which an interpreter or Mujtahid should adopt to discover and determine the *maslaha*, Hassan suggests not only the theories of istihsan and al-Masalih al-Mursalah but also other means which could be helpful in

arriving at the intention of the law giver. This is, in a nutshell, his point of view.

On going through his work we find that the views of Hassan differ from those of Saeed Ramaḍan. While according to the former, *maslaha* must be consistent with the text, the latter holds that it should not be contradictory to the text. The best course, therefore, is to follow the principles acted upon by the Orthodox Caliphs who lived with the Prophet and had the profound knowledge of the text.

The procedure adopted by them has been explained under Chapter 11. To repeat, it consisted of strict analogy or qiyās tam when the illah was apparent, sound analogy or tawil when illah was not apparent. Tawil covered various ways, of arriving at the intention of the law giver, by resorting to the words of the text, meaning implicit therein, context thereof and the traditions of the Prophet. Further, there was the Rule of Necessity and Need to be invoked if anything essential was left uncovered by sound analogy. This served best to preserve Shari'ah in its ideal form and also to reconcile stability of law with change as explained in the preceding pages. The distinguishing feature of Shari'ah is that it effects reconciliation between stability and change in its own way which renders it a perfect law and for all time.

At the end of his work, Hassan has given a summary of his views according to which Shari'ah has the capacity to meet all the needs of the people and there is no interest except what is contained in Shari'ah. His statement that interests are only such

as are endorsed by Shari'ah, reduces interests to needs and necessities. This is further borne out by his oft repeated words '*Masalih al-Umma*' (interests of community) used as synonymous with '*Hajāt al-Jam'a*' (needs of society).[38] One has to bear in mind that Shari'ah takes cognizance of only such interests as are essential and this itself reduces interests to needs and necessities. We particularly point to the fact that in all these three research works *masalih* have been used in the restricted sense to mean needs and necessities for which is the Arabic word, '*hajāt*' that often occurs in these works. Further the text and other examples which are quoted by the authors in favour of *masalih*, relate, in their real sense, to needs and necessities. Why not, then, needs and necessities be treated as a source of law ?

The term *masalaha*, being too general, vague, and uncertain, cannot be the source of law as explained before. In their restricted sense, as specified above, *masalih* are nothing except needs and necessities, hence these and not *masalih* be regarded as a source of Law. Fitzgerald has already held it so.[39] Let us now turn to the Rule of Necessity and Need.

17

RULE OF NECESSITY AND NEED

(a) Its Importance

The Rule of Necessity and Need occupies a very important place in Shari'ah because of its various benefits and advantages. It takes cognizance of the genuine needs of society and provides facilities to those who are confronted with hardships. It has an amazing capacity to meet every emergency in life without changing the Law. Law is not changed under this rule for it is not a free licence to change the Law and what is permitted under it has its limitations as to time and extent thereof. Being of resilient character it ceases to operate as soon as the urgency is over, the *status quo* of Law is, thus, maintained. Law is enabled to remain stable and also to accommodate the change. Reconciliation between stability and change, the supreme quality of an ideal i.e., perfect law, is only possible under the Rule of Necessity and Need. This is the marvellous function which this rule performs. Further, opportunities are provided under this rule to adopt what is essential as an *ad hoc* measure or tentative arrangement. For instance, some principles of Western Commercial Law may be adopted under necessity and need so that we may probe into Shari'ah, which contains broad principles and is a declaration on all matters, and thereby have our own

solutions. These benefits and advantages cannot be derived from the principle of *maslaha* which, besides being of a uncertain and vague character, not only admits abuses in life but also requires permanent legislation and introduces changes in Law.

It is generally presumed that the Rule of Necessity and Need is of a limited scope and cannot serve as a source of Law, but it is a wrong presumption because the rule is always there to meet the needs and necessities as and when they arise. Further, it is contended that 'necessity knows no law' and, as such, the rule serves to break the law. But one has to make distinction between the breach of law and the deviation from it to avoid injury which sometimes results from the meticulous observation of law, for instance, hunger, if not satisfied, results in death. In such cases even the prohibited things become permissible.

As explained in the preceding chapter, Fatawa or verdicts can change, for they are merely the opinions of Jurists but the Law of God cannot change. What appears to be the change in law, as previously explained, is only the deviation from it under the Rule of Necessity and Need or *ad hoc* measures adopted under this Rule immediately to meet the needs and necessities and then find out proper solutions in the light of the text. The Law, as such, remains the same to become applicable as soon as the solutions are found or things revert to their former and original position or their seriousness is mitigated or fresh situations arise that call for fresh application of the same Law.

(b) Necessity Permits Prohibited Things[1]

'Necessity permits prohibited things' is the general maxim incorporated in Article 21 of the Majallah (Ottoman Civil Code) and, according to Ghazzali, all prohibited things become permissible by necessity.[2] There are numerous examples to illustrate this point. They include those legal excuses which exempt from legal duties, such as minority, lunacy, illness, duress, forgetfulness and ignorance.[3] Other examples where necessity renders prohibited things permissible are : eating of the meat of the dead animal by the hungry, and drinking of wine by the thirsty or, according to some Jurists, by the sick as a medicine.[4]

Shari'ah is considerate enough to take notice of particular occasions where its severity has to be mitigated in order to provide facilities to those who are subject to hardships. We read in the Qur'ān : 'God desireth for you ease ; He desireth not hardship for you' ;[5] 'He has chosen you and hath not laid upon you in religion any hardship'.[6] This is further supported by the saying of the Prophet : 'Religion is facility'. The most beloved religion to God is tolerant orthodoxy'.[7] It is perhaps for this reason that al-Marwardi (Qaḍi Husayn) has described this rule as one of the four pillars supporting the structure of jurisprudence.[8]

(c) Hardship begets Facility

'Hardship begets facility' is the principle laid down in Article 17 of Majallah. Hardship refers to

necessity and need and not to a non-essential interest (luxury). The above principle means that 'difficulty is the cause for easiness and in time of urgency latitude must be allowed'.

Many legal rules, such as loans, transfer of debts, and incapacity, are derived from this principle and leniency and indulgence shown by Jurists in their rulings are all based upon this rule.[9] Article 18 of Majallah denotes that latitude should be afforded in the case of difficulty, that is, upon the appearance of hardship in any particular matter latitude and indulgence must be shown.

Other examples in this regard are payment by instalments allowed to the debtor if he is in straitened circumstances : 'And if the debtor is in difficulty, grant him time till it is easy for him to pay'. Likewise the period of hire is extended until the shore is reached if a boat is taken on hire for a certain period and the period expires while still on journey'.[10]

The most outstanding of all such examples is the transaction of *bai bilwafa* or redeemable sale which came into existence to meet the needs of the heavily indebted people of Bukhara. This is an example of sanctioning certain transactions for which people are in need in their economic life.[11] The Majallah embodies a rule to this effect : 'Need, whether of a public or private nature, is treated as necessity. The validity of sale subject to a right of redemption is of this nature. The inhabitants of Bukhara having fallen badly into debt, this procedure was put into operation in order to meet their need for it'.[12]

Fitzgerald has treated the Rule of Necessity and Need as a source of Law.[13] 'Necessity knows no law', is the common precept and can be applied to cases of urgency. The mounted soldier awaiting battle is allowed to say his prayers in the saddle instead of dismounting.[14] Fasting during the month of Ramaḍan is obligatory but its postponement is permitted while a Muslim is travelling.[15] Similarly a starving Muslim may eat of forbidden things to save his life.[16]

(d) Limitations

The meticulous adherence to law in certain cases turns into injury and is followed by serious consequences, so it is allowed by Shari'ah to invoke the Rule of Necessity and Need on such occasions. Here one has to make a distinction between necessity and need. By 'necessity' is usually meant something more pressing than 'need' and which, if not fulfilled, leads to serious results. Hunger, for instance, if not satisfied may result in death. The rule of necessity, therefore, is not a free licence but subject to certain limitations which may best be explained by the Qur'ānic Verse: 'He hath forbidden you only carrion and blood, and swine flesh and that which hath been immolated to (name of) any other than God. But he who is driven by necessity, neither craving nor transgressing, it is no sin for him'.[17]

Mark the words 'neither craving nor transgressing' which are interpreted by Tabari as having no vehement desire for eating what is forbidden nor intending to overstep the limit by permitting oneself to eat what is forbidden when one can afford to refrain from it on account of what can be had of

lawful things,[18] and as a natural corollary, says Razi, the sanction contained in this verse ceases to exist when the urgency is no more.[19]

Ibn Qayyim has drawn a distinction between need (ḥaja) and necessity (ḍarura). According to him what is prohibited as a preventive measure i.e. Sadd al-Dharai, becomes permissible in view of the public needs but what is forbidden with a definite purpose cannot be permissible unless there is necessity for it. This point he has illustrated by citing numerous cases where prohibition is due to preventive measures.[20] The distinction between need and necessity is, therefore, to be observed in deciding cases. Necessity, under Article 22 of the Majallah, is estimated by the extent thereof and so is the time limit. Whatever becomes permissible owing to some valid excuse ceases to be so with the disappearance of that excuse.[21] And this is quite in conformity with the principles of justice and equity.

Frankly, the determination of the extent and the time of necessity and need, and whether it is necessity or need, depends in individual cases upon one's conscience and taqwa (fear of God) which is the true measure of judgment of human actions, but in matters relating to the community these factors may be decided in the manner suggested by Ghazzali—ijmā' of the community for the fundamentals and ijmā' of the scholars for matters of detail.[22]

In sum, the four sources of Shari'ah as supplemented by the Rule of Necessity and Need are enough to accommodate the change and meet every eventuality in life.

18

CONCLUSION

To conclude from what we have discussed under the preceding chapters we may say : (1) that revelation is the only source of real knowledge (Chapter I), (2) that human laws being the product of reason (which is subject to change and also liable to err) are always in a state of flux and fluidity (Chapter 2 to 5), and (3) Islamic law (Shari'ah), Divine and based on the Wisdom of the All-Wise God, is alone ideal, i.e. perfect and for all time, hence its ideal form is to be preserved at all costs (Chapters 6 to 17).

To be brief, Shari'ah, as expressed in the Qur'ān and the Sunnah, has implicit in it solutions for all the problems of human life. Legislation in Islam, as already stated, is the extension of the text (the Qur'ān and the Sunnah) by way of analogy or qiyās. It is, in other words, interpretation of the text or ijtihad. This ought to proceed on the lines followed by the Orthodox Caliphs. According to the procedure which they adopted, in this regard, analogy is of two kinds, strict and sound. When a common cause or illah between the text and the case to which the text is extended was apparent, they used the strict analogy or qiyās tam, otherwise they

resorted to sound analogy or tawil.

In this way the Qur'ān and Sunnah (as incorporated in recognized traditions) are the two original or primary sources, analogy being a source subordinate to them. Further, if analogy is supported by general agreement it assumes the form of ijmā' or consensus which is accepted as a valid source of law to be extended again by analogy. Thus ijmā' and qiyās are two additional sources subordinate to the original ones. The sources of Shariah are, thus, four in all and to supplement them there is the Rule of Necessity and Need. The definition of ijmā· as given by Shafi'i includes the agreement of the entire community. Considering the difficulty of arriving at such an agreement, the view of Shafi'i is opposed by others, while Ghazzali has worked out a *modus vivendi* confining unanimity of the community to the fundamentals, leaving matters of detail to the agreement of the scholars.

The above procedure together with the Rule of Necessity and Need provides for every eventuality and can cope with any situation in life.

Shari'ah Law is systematic and comprehensive and those who try to find conflicts and tensions therein are not justified. They fail to make a distinction between the original sources and those that are subordinate to them. Further, they think of Divine Law in human terms.

Qiyās or analogy, as explained under Chapter 12, is only an attempt to discover law and the difference of opinion therein is due to the use of

reason in trying to deduce rules from the sources of law, hence whatever the Jurists arrive at is not law but only an opinion, which is subject to change, and error. Therefore, the decision of a qaḍi or judge may be changed even by himself if he finds it to be incorrect. It is not at all a precedent to be followed by the courts, it may be reversed, repealed, and disapproved. But the Orientalists treat it as a precedent in English sense and take it for law and describe Islamic law as a Jurists' law. They present the difference of opinion among the Jurists as conflicts in law. They are either guided by an erroneous view or by a biased mind which picks holes in the perfect and Divine system of law. Their own laws are conflicting, defective and corrupt 'those who live in glass house should not throw stones'.

Now we proceed to expose the erroneous view which Coulson has taken of Islamic law, in his six lectures, given at the University of Chicago and published by the same University in 1969 in the form of a book entitled 'Conflicts and Tensions in Islamic Jurisprudence'.

PART IV

ORIENTALISTS AND THE RECENT PUBLICATIONS

* Coulson's Conflicts and Tensions in Islamic Jurisprudence

* Kerr's Islamic Reform

19

COULSON'S 'CONFLICTS AND TENSIONS IN ISLAMIC JURISPRUDENCE'

In his introduction to the above work which contains his six lectures, given at the University of Chicago Law School, Coulson first speaks of the conflicts and tensions of Western Jurisprudence as essentially the product of diverse philosophies of life and political ideologies which have found their vogue in Western Civilization and which differ in their view of the ultimate values and purposes of human life. But the fundamental question of the nature of Islamic Law, he says, 'is answered for Muslim Jurisprudence, in terms that admit of no compromise, by the religious faith itself. Law is the divinely ordained system of God's commands. To deny this principle would be, in effect, to renounce the religious faith of Islam'.[1]

He, then, passes a sarcastic remark : 'But while law in Islam may be God-given, it is man who must apply the law—'God proposes : man disposes'.

'In short', says he, 'Jurisprudence of Islam is the whole process of intellectual activity which ascertains and discovers the terms of the divine will and transforms them into a system of legally enforceable rights and duties. It is within, but only within,

these strict terms of reference that the tensions and conflicts of Islamic legal thought arise'.[2] But in his forward march he holds the whole of Divine Law as conflicting and brings it under the fire of his unfair and unjust criticism.

He, at the outset, admits the difference between the Western laws which are the product of diverse philosophies of life and the Divine law of Islam which approves of no compromise with the Western legal thought. And, indeed, there can be no compromise between the former which is subservient to society and the latter whose purpose is to control society and to purge it of its evils. When he knows full well the basic difference between these two, his entire criticism of Islamic law from the standpoint of Western laws and Western society is void *ab initio*. The pith and marrow of his six lectures is that Islamic law is idealistic and far from the realism of society and what he wants is that the Islamic law be determined by social facts and be reduced to the position of man-made laws. This is definitely against the ideology and spirit of Islam. Divine Law cannot brook compromise with human laws, for such compromise will deprive it of its very purpose of controlling society.

'Islamic Law', writes H. A. R. Gibb, 'was the most far-reaching and effective agent in moulding the social order and the community life of the Muslim peoples....The moral authority of the Law held the social fabric of Islam compact and secure through all the fluctuations of political fortune'.[3] The Law

has its own ethical norms of good and evil, vice and virtue to which society has ideally to conform and, thus, it influences all aspects of social and economic life as well as all branches of literature. In the words of Bergstrasser, it is 'the epitome of the true Muslim spirit, the most decisive expression of Islamic thought, the nucleus of Islam'.[4]

Gibb has given a true account of Islamic Law whose moral authority held the social fabric of Islam compact and secure through all the fluctuations of political fortune. Is it, then, desirable to change or cast aside such a law ? Will it not be suicidal if we violate the law or act in a manner which offends its spirit ?

Coulson's sarcastic remark 'God proposes : man disposes', holds no water for God Himself cannot enforce His law. Man, therefore, is the vicegerent of God to establish His Will on earth as Christ has also stated : 'Thy Kingdom come. Thy Will be done in earth, as it is in heaven'.[5] The Will of God must prevail in the world which is possible only through the human agency.

For Coulson 'Jurisprudence of Islam is the whole process of intellectual activity which ascertains and discovers the terms of the divine will and transforms them into a system of legally enforceable rights and duties'. But this process does not amount to law, nor can serve as a precedent to be cited and to enforce rights and duties unless it fully conforms to the text (the Qur'ān and Sunnah).

Here again he is mistaken in taking Jurists' opinion for law. Jurists' opinion is not at all

regarded as law, for it is only an attempt to comprehend or discover the law and not to create or establish it. There may be difference of opinion among the Jurists according to their own understanding of law, hence ijmā' is necessary to authenticate and establish the truth that it conforms to the text. We have discussed this point under Chapter 13. There is no conflict and tension in Divine Law as contained in the Text. Now we proceed to review his lectures, in their respective order, under separate headings.

(a) Revelation and Reason (First Lecture)

Coulson's lecture begins with the remark: 'Islamic Law has been alternatively described as a divine law and a Jurists' law. These apparently contradictory descriptions reveal the basic tension that exists in the system between divine revelation and the human reasoning of Jurists'.[6] He does not disclose who has described Islamic Law in such a manner. Perhaps it is his own invention or misconception of law.

To illustrate his point he has chosen a problem of inheritance which did not arise as an actual case but a hypothetical one. It bears the name of Malik's Rule, after the Jurist who devised the case and solved it.

The problem is the case of a Muslim woman who dies intestate and is survived by her husband, her mother, her paternal grandfather, her germane brother and two uterine brothers. How will her

estate be apportioned among these surviving relations ?

The root problem in this case, says he, is the right of succession of the male agnate relatives who, according to him, find scarcely any mention in the Qur'ān. To answer this problem recourse was had to Sunnah, i.e. the decision by Prophet in the case of the estate of Sa'd whereby Sa'd's brother (male agnatic relative) was treated as a residuary after the widow of Sa'd and his two daughters were allotted their shares prescribed by the Qur'ān.

In our problem, says he, the husband and mother of the praepositus are primary heirs and cannot be excluded. On the other hand, no jurist doubted that the paternal grandfather, as an agnatic ascendant, was sufficiently superior to the maternal collaterals—the uterine brothers, to oust them from any right of succession. The only problem of priority, therefore, concerned the germane brother. Was he also to be excluded by the grandfather as an inferior agnate relative ?

Thus, from the Qur'ānic regulations and the Prophet's decision in Sa'd's case, as supplemented by Juristic reasoning based on the criteria of priority the uterine brothers are excluded by the grandfather. The husband takes his Qur'ānic portion of one-half and the mother her portion of one-sixth. The male agnates, the grandfather and the germane brother, stand on a parity and share the residue between them, each therefore receiving a share that amounts to one-sixth of the estate.

But now the question was put : 'Suppose the grandfather had not survived the praepositus in this case ? What then ?' Then the problem would have been identical with the case decided by the Caliph 'Umar, and which acquired the title of 'the Donkey Case' (al-himariyya).

Faced with the task of distributing an estate between the deceased's husband, mother, uterine brothers, and germane brothers, 'Umar first decided that the Qur'ānic heirs should take their allotted portions and then the male agnates should take the residue. The result was most unfortunate as far as the germane brothers were concerned ; for there was here no superior heir (like grandfather) to exclude the uterine brothers, who, as Qur'ānic heirs, were entitled to a portion of one-third as a first charge upon the estate. And this together with the husband's portion of one-half and mother's of one-sixth, completely exhausted the estate, so that nothing remained for the germane brothers to take as residue.

On appeal to 'Umar the germane brothers contended that if they sought no advantage *vis a vis* the uterines from their agnate tie through the father of the deceased, did not the deceased, the uterine brothers, and themselves all have the same mother—this being the sole ground for the uterine's claim ? The name of this case 'the Donkey Case' is derived from the way in which the germane brothers expressed their argument : 'Suppose our father were a donkey of no account, do we not still have the same mother as the deceased ?'

'Umar reversed his original decision, and ordered that the third of the estate remaining after the claims of the husband and mother were satisfied should go in equal shares to both the uterine and the germane brothers. 'Umar's decision was controversial. It was a division of opinion among the Jurists concerning the relative significance of the letter and the spirit of an established rule.

Returning to his particular problem, Coulson states : 'Those Jurists who accepted the principle underlying 'Umar's final decision in the Donkey Case maintained that this precedent governed the present case and therefore necessitated a revision of the systematic solution that the grandfather and the germane brother should share equally in the residue. If the grandfather were not present, they argued, the germane brother would not inherit as an agnate brother but as a uterine brother. Why should this situation change simply because the grandfather comes upon the scene ? And if the status of the germane brother remains that of a uterine when the grandfather does come upon the scene, then he must be excluded from succession, it being settled law that the grandfather excludes all uterines. In other words, why should the exclusion of the actual uterines by the grandfather not operate solely to his advantage ? The germane brother did not exclude the uterines and would not inherit as an agnate heir in the absence of the grandfather. Why, then, should he be allowed to do so simply because the grandfather is present, and to the latter's obvious detriment. Hence, the final solution of Malik's Rule is

to allow the grandfather to take the whole residue of one-third in these circumstances to the total exclusion of the germane brother.

The above is an example put forward by Coulson to prove tension in Islamic Jurisprudence. 'In this light' says he, 'Islamic Law is both a Divine Law and a Jurists' Law'.[7]

In review we refer to Chapter 13, wherein we have fully discussed the point that Jurists' opinion is in no way the law. Malik himself has said : 'I am but a human being who is capable of right and error. Consider my views carefully ; whatever is compatible with the Qur'ān and the Sunnah, accept it ; whatever is in conflict with the Qur'ān and the Sunnah set it aside'. It was on the basis of this conviction that Malik warned the Caliph Harun al-Rashid against imposing the Maliki school on the people.[8] Likewise, the Caliph 'Umar said : 'Umar does not know whether he has attained the truth but he spared no efforts in striving to do so'. And he admitted his error in the course of a public speech, and in reply to a woman who criticized him for forbidding excessive dowry : 'A woman has said the truth and 'Umar has erred'.[9]

Thus, a Jurist's opinion has no finality and never a law unless authenticated by ijmā'. It is incumbent on every qualified person to exercise his own efforts to find the truth. But Coulson speaks of Jurist's opinion as law and 'Umar's decision in Donkey Case is, to him a precedent. He is wrong to think of Shari'ah in terms of English Law where 'a judicial precedent speaks with authority'[10] and

the courts are bound to follow it as an established law. Hence, his argument that Islamic Law is both a divine law and Jurists' law is not tenable. Shari'ah is wholly divine law and cannot be a Jurists' law, nor is there any tension or conflict in Islamic Jurisprudence, for the finality rests with the text as previously explained.

Strangely enough, he remarks that male agnate relatives find scarcely any mention in the Qur'ān. We have simply to refer him to the Qur'ānic Verse (4 : 176), wherein such relatives are mentioned :

'They ask thee for a legal decision, say : God directs (thus) about those who leave no descendants or ascendants as heirs. If it is a man that dies, leaving a sister but no child, she shall have half the inheritance. If (such a deceased was) a woman, who left no child, her brother takes her inheritance : if there are two sisters, they shall have two-thirds of the inheritance (between them) : if there are brothers and sisters, (they share), the male having twice the share of the female, thus doth God make clear to you (His law), lest ye err. And God hath knowledge of all things.'

Further, Coulson has tried to present the case, in a round about way, to prove his point that there are tensions in Islamic Law and Jurisprudence. At first there is a charge against him of mis-statement of facts. Shaikh Ibrahim Ibn Abdullah in his *al-Adhb al-Faid Sharh Umdat al-Farid*[11] has given an account of this case which, in terms of the statement of the appellants (*i.e.*, germane brothers) requesting the

Caliph 'Umar to suppose that their father was a stone thrown into the ocean, acquired the title of al-Hajriyya and al-Yammiyya (Stone and Ocean Case) but Coulson has preferred to cite it as al-Himariyya (Donkey Case) to ridicule and make a laughing stock of it. Moreover, instead of expressing it in a straight forward way he has given it turns and twists to suit his purpose. It is, in fact, a simple case of inheritance relating to germane brothers and grandfather which has been correctly solved by Ibn Qayyim al-Jawziyya in a few words.

Shari'ah is not opposed to sound analogy. According to law, says Ibn Qayyim, son's son excludes the germane brother. Because the position of grandfather is correspondingly the same in the ascending line as is the position of son's son in the descending line and because the son's son and the grandfather are both in the same degree of removal from the deceased, grandfather also excludes the germane brother.[12]

Ibn Qayyim claims this solution to be the right one. He has proved the correctness of this solution by citing many Qur'ānic verses wherein grandfather is spoken of as father. To him, the text (the Qur'ān and the Sunnah) is not opposed to sound analogy[13] and he has given many examples, in his *'Ilam*, to substantiate his statement. He distinguishes between the valid and invalid uses of legal reasoning. Some, he says, are definitely sound, namely those that stem from the clear implication of revealed texts through identifications of their causes or ilal. Others are false in that they contradict the revealed text owing to inadequate or wrong interpretation of the text.

This he has proved in a long discourse.[14]

Here it becomes clear that the difference of opinion among the Jurists is, in fact, due to their reasoning and various ways in which they try to discover the law. Such difference of opinion cannot be presented as tensions and conflicts in law. Perhaps Coulson fails to grasp the nature of Islamic law and Jurisprudence.

(b) Unity and Diversity (Second Lecture)

To begin with, in this lecture, he quotes the saying of the Prophet : 'Difference of opinion within my community is a sign of the bounty of Allāh', and says : 'This alleged dictum of the Prophet Muhammad serves to explain and justify, to Muslim Jurisprudence, the phenomenon of the wide spread divergence in the doctrines of the Jurists qualified to expound Shari'ah law. In a sense the tension between unity and diversity in Islamic legal doctrine is a natural and inevitable consequence of the basic tension I spoke of in the previous lecture between the two constituent elements of Islamic law : for divine revelation represents the fixed and constant factor, and human reason the variable and fluctuating factor, in Islamic Jurisprudence. There is also involved in the present antinomy the distinction between the ideal and the actual state of affairs. Muslim Jurisprudence, at least in its classical form, had no doubt that Shari'ah law existed as a single comprehensive and uniform code of behaviour prescribed by Allāh for all his creatures on earth. But in its endeavour to perceive and comprehend

this ideal law the human intellect was fallible and deficient, and variations in the results of Juristic speculation as to the contents of the Shari'ah had perforce to be accepted as a matter of fact'.[15]

He, then, speaks of the four Sunni schools and difference of opinion therein and also cites examples of marriage contract, guardianship, and other cases where difference of opinion arose among the Jurists on different grounds and for various reasons.

We have already pointed out his misconception of Islamic Law. He takes opinions of Jurists for law and tries to present the difference of opinion among the Jurists as tensions and conflicts in law. His argument, therefore, is fallacious from the very start.

There is practically nothing new in this lecture except what he has stated previously—the same substance under a new heading. It may be recalled that the Qur'ān and the Sunnah are the original socurces, while Qiyas and Ijmā' are subordinate to them. The object of these subordinate sources is to protect the ideal, that is, perfect form of divine law contained in the original sources. Qiyās, therefore, furnishes different opinions as to the comprehension of law so that Ijmā' may sift the genuine from the spurious and authenticate such of them as conform to the letter and spirit of law.

The saying attributed to the Prophet : 'Difference of opinion within my community is a sign of the bounty of Allāh' is fictitious and baseless as proved by Shaikh Nāsiruddin Albani,[16] but Coulson seems to be unaware of it or purposely quotes what is false

just to support his argument.

Not only Nāsiruddin but also Ibn Hazm in his *Ihkam fi Usul al-Ahkam* says that it is not, at all, a saying of the Prophet and cannot be so, for if difference within the community were a bounty of Allāh, unity would be none other than a curse. The saying is, thus, false and forged particularly because it is opposed to the Qur'ānic verse : 'And fall into no disputes, lest ye lose heart and your power depart' (8 : 46).

There can be no diversity in Islamic Law for its unity is protected and well guarded : 'We have, without doubt, sent down the Message ; and We will assuredly guard it (from corruption)',[17] is the Qur'ānic Verse.

As to the different schools of law we consider it enough to quote Ibn Qayyim : 'The disagreement among the madhahib on various points is no logical indication of contradiction among the textual sources, but only imperfect degree of understanding on the part of each madhhab. This is also the view of Ibn Taymiyya.[18]

We have given under Chapter 13 the views of Abu Hanifa, Malik, Shafi'i, and Ahmed ibn Hanbal, none of whom insists upon his view, and all of them advise to follow what is in the text.

Coulson stands for the rational interpretation of the text and is in favour of the principle of *ibaha* which he has translated as tolerance of the law giver. He thinks of its application to God's Command— 'Marry women of your choice, two, or three, or four ; but if ye fear that ye shall not be able to deal justly

(with them), then only one.'[19] He must know, that a conditional clause must be interpreted strictly in terms of its letter and spirit and should not be taken to mean exclusively a recommendation in favour of monogamy. None can change the Words of God : 'The word of thy Lord is complete in itself, rightly set and perfectly balanced. None can change His words : for He is the One Who heareth and knoweth all'.[20]

Here it may be mentioned that unlimited number of wives of the pre-Islamic period was limited to four only and that too under a strict condition. The door for polygamy was left open to meet emergencies. War, for instance, takes a heavy toll of men and the balance between the sexes is seriously shaken, or the wife falls sick for an unlimited period and sometimes the disease is incurable so as to render the sexual union impossible and it is in such cases that polygamy becomes a social necessity. Hence it is unlawful to apply *ibaha* to close the door of polygamy.

Coulson admits that 'Muslim Jurisprudence, at least in its classical form, had no doubt that Shari'ah Law existed as a single comprehensive and uniform code of behavior prescribed by Allāh for all his creatures on earth. But in its endeavour to perceive and comprehend this ideal law the human intellect was fallible and deficient, and variations in the result of Juristic speculation as to the contents of the Shari'ah had perforce to be accepted as a matter of fact...Arising as it does out of the search to discover the ideal law of the Shari'ah, the phenomenon of unity

and diversity in legal doctrine goes to the very heart of Muslim Jurisprudence.'[21]

His mistaken view of Islamic Jurisprudence is apparent from the fact that he treats qiyās as an original source of law. Qiyās is only an attempt to discover the law and not to establish or create it. 'Variations in the results of Juristic speculation', he assumes, 'had perforce to be accepted as a matter of fact', while all such variations are actually set aside by Ijmā', for no opinion of the jurist can become the law unless it fully conforms to the text. Thus there is unity and no diversity in Islamic Law.

Coulson himself is a victm to conflicts, for he changes his position from time to time. In his statement as above he admits that human intellect is fallible and deficient and in the very succeeding chapters he advocates the free use of reason. Is he justified in suggesting to Divine Law free use of human reason which is fallible and deficient ?

(c) Authoritarianism and Liberalism (Third Lecture)

In this third lecture Coulson refers to a remark made by Lord Justice Goddard as to the boundless discretion and arbitrary whim of a Qaḍi or Muslim Judge and says: 'I propose to consider in this lecture what measure of freedom a Muslim judge or jurist in fact enjoys to determine the law, and to contrast in this respect the traditional attitude which dominated Islam from early medieval times to the present century with the new philosophy which is emerging today in contemporary Muslim States.

'Islamic Jurisprudence is a speculative essay to

comprehend the prescise terms of Allāh's law. In the preceding two lectures I have outlined the nature of this process of comprehension and observed the varying results that derived from it. The question to be asked now is what authority the resultant doctrine has commanded in practice both for the jurists whose task it was to expound the law and for the judges whose task it was to apply it. In the interpretation of the accepted texts of divine revelation or in the regulation of new cases, did the individual judge or jurist enjoy a personal freedom of decision, or was he required to follow some recognized authority ? Because of the essentially tentative and speculative nature of Shari'ah law and because of the total involvement therein of the religious conscience, the tension between the notions of individual freedom and binding authority in this context is particularly acute'.

He, then, speaks of the closing of the door of ijtihad and the doctrine of taqlid on account of which no judge or jurist felt free to consider the text and had to follow the doctrine of the early Jurists whose works had become 'the mother-books' of the school. But with the change of social order, he says, the yoke of taqlid had perforce to be thrown off, and in consequence Islamic Law is codified in the Middle East supplanting the medieval manuals. He gives instance of the modern codifications of Islamic Law in the Middle East and Judicial decision in Pakistan to show a greater freedom of independent enquiry to ascertain the terms of Islamic Law.

In this lecture Coulson refers to the authoritarianism of taqlid, but taqlid is not obligatory in Shari'ah. Every person qualified for ijtihad is duty bound to exercise his efforts to ascertain the law from the text by analogical reasoning. Reason is subject to analogy in order to preserve the law in its ideal form. Liberalism to the extent of the free use of human reason is, therefore, disallowed.

His words that 'Islamic Jurisprudence is a speculative essay to comprehened the precise terms of Allāh's Law' indicate that he speaks of Law in terms of Jurists' opinion. This is entirely a wrong view upon which he bases his argument. The interpretation of the text, whether by a jurist or by a judge, does not attain the status of law if not backed by Ijmā'.

He expresses his appreciation of greater freedom of independent enquiry for ascertaining the terms of Islamic Law and presents, as an example, the Tunisian Law of 1957, which declares : 'Any divorce outside a court of law is devoid of legal effect.' The law that puts the wife in the matter of divorce on an exactly equal footing with husband is the result of free use of human reason and is an inadequate interpretation of the text, which expressly gives to husband the power to terminate the marriage unilaterally.[22] Article 14 of Majallah says : 'Where there is a text there is no room for interpretation'.

Islamic Law is fair in giving to husband unilateral power to divorce his wife, for the difference in economic position between the sexes makes the man's right greater than woman's (4 : 34). Still the

right to divorce is not without conditions. The husband has to pay her dower or *mehar* if he has not paid it and she is entitled to maintenance during the wait ing period or *idda* which lasts three months following the repudiation or divorce and in case she is pregnant until the birth of the child. Further, divorce is not to be resorted to unless it has become impossible for the parties to live in peace. As described by the Prophet, it is worst of all the things which the law permits. Apparently it seems that the husband enjoys some authority over his wife but she has the right to demand divorce of him if she fears ill-treatment by him. In this case she should give back to her husband the dowry she received from him as the husband too, in the event of divorcing his wife, has to forgo all that he gave her. The marriage is dissolved if she proves before the court that she has been ill-treated by the husband or he failed to give sustenance allowance agreed upon between them. The most effective weapon is to secure the right to divorce from her husband at the time of marriage contract. Thus the law of divorce is not unfair.

Shari'ah has its own scheme of life and seeks to implement it in its own particular way which is upset by the use of human reason. The need is, therefore, to protect the authority of Shari'ah and keep it in its ideal form. No sensible man would like the way of Western life where the husband, due to restrictions on the power to divorce, has perforce to live with an immoral wife and even to entertain her boy-friends.

(d) Idealism and Realism (Fourth Lecture)

In this lecture Coulson intends to focus attention more closely upon legal practice in Islam, and the administration of law through the official tribunals of the Muslim state.

He gives some instances of distaste, on the part of the medieval Jurists, for the office of judge and says that the law grew out of the actual judicial decisions of the Prophet, and his political successors like the Caliph Umar. The earliest scholars in the law schools also were often men of a practical outlook. He points out that 'with the Jurisprudential debate which began toward the end of the eighth century and eventually produced the theory of the sources of law, came the notion of the Shari'ah as the comprehensive and pre-ordained system of God's commands, a system of law having an existence independent of society, not grown out of society but imposed upon society from above. And the discovery of this pure law, it was felt, was a task best undertaken in isolation from practice. Muslim Jurisprudence then became essentially an introspective science, concerned with the elaboration of the pure Shari'ah law in abstracto and content to leave the mundane matter of the enforcement of the doctrine it expounded to the officials of the State. This idealism of the medieval Jurists, who adopted the role of spiritual adivsers to the conscience of Islam rather than practical administrators of its affairs, created a decided rift between legal doctrine and legal practice and a clear division between the role of the Jurist

and the role of the Judge. In Islam, therefore, there is a particularly significant tension between the legal ideal and the social reality.'[23]

Here is his mistaken view of the earliest scholars and of those who began jurisprudential debate, toward the end of the eighth century, which eventually produced the theory of the resources of law. The outstanding figure (as the chief architect of jurisprudence), in this period is Shafi'i (767-819) whose theory of sources is quite in consonance with that of the Companions of the Prophet, the earliest scholars. This we have proved under Chapter 7. The notion of Shari'ah as the pre-ordained system of God's Commands and a system not grown out of society but imposed upon society from above is not newly created but forms the basis of Shari'ah as preached by the Prophet and his Companions, particnlarly the Orthodox Caliphs. Shari'ah being the Divine Law and a standard to judge human actions had to be preserved in its ideal form and was not to be determined by social facts which are subject to change. Social reality which Coulson stresses upon is but a changing phenomenon and Shari'ah would have ceased to exist long ago, had it been changing with this sort of changing reality. God's Law has to remain (for ever) immutable as a pattern to be strictly followed. 'Follow (O men !) the revelation given unto you from your Lord, and follow no patrons apart from Him' (7 : 3) is the command of God.

Coulson then proceeds to criticize the scheme propounded by the Jurists concerning the constitution of

courts, the rules of procedure and evidence. The doctrine, he says, recognizes the court of a single qaḍi and makes no provision for courts with a plurality of judges nor for any system of appeal. There is no jury system, the witnesses must be male, adult Muslims, the testimony of women is admitted in certain cases though on the basis that two women are needed in the place of one man. Further, to qualify as a witness a person must possess a quality of high moral integrity. Circumstantial evidence is normally rejected and is admitted by way of exception when it is well-nigh conclusive. The outstanding feature of this system of procedure and evidence is the way in which it deliberately restricts the scope of the individual judge's discretion in the matter of fact-finding.

According to him, it is because of the idealistic scheme of procedure and evidence and the self-imposed limitations of the Shari'ah as a practical system of law that there have existed in Islam since early medieval times Jurisdictions other than that of the qaḍi's court. This extra-Shari'ah jurisdiction, he says assumed a variety of forms. There was, for example, the summary Jurisdiction in petty commercial affairs of the Inspector of the market-place ; and of the Chief of Police in criminal cases. Another judicial officer was appointed solely to resolve cases which the qaḍis failed to resolve because they could come to no proper decision on the basis of the evidence offered. But the most important of these alternative Jurisdictions was that

of the official known as the 'Master of Complaints' or Sahib al-Mazalim. This official came to have an extensive jurisdiction in those spheres where the speedy and effective administration of justice was of particular concern to the political authority. While the qadis became identified as the servants of the Shari'ah law, the Mazalim officials were regarded essentially as the representatives of the political ruler's law. The distinction came dangerously close to a dichotomy between religious and secular Jurisdiction.

He proceeds further and says that during the latter part of the nineteenth century the dichotomy in Islamic legal practice became much more pronounced. The presence of Western European powers in the Near and Middle East had produced a rapid expansion of trade and the development of novel commercial techniques. And as the most realistic way to cater for this situation, the Muslim countries of the Near and Middle East promulgated codes of commercial law and procedure based on European models.

Family law, according to him, has been profoundly modified, in recent times, in a variety of ways, to conform to the changing standards and values of contemporary society. So, too, the rules of procedure and evidence by which the courts are bound have changed ; and the rigid idealistic scheme of the traditional doctrine has been relaxed in many respects.

The Sovereign's power of *Siyasa*, says he, was

used to prevent the Shari'ah courts from deciding issues of paternity on the basis of certain traditional evidential presumptions. Traditional Hanafi law recognized a presumption that the gestation period could last for two years, and five years in the Maliki doctrine. In modern times, however, with authoritative medical opinion setting the period of gestation at a maximum of one year, the traditional Shari'ah law occasioned manifest injustice. For example, a child born to a widow just short of two years after her husband's death would be presumed to be the legitimate child of the former husband and therefore entitled, *inter alia*, to inherit the lion's share of his estate. Upon those who sought to deny the claims of this dubious child would lie the almost impossible onus of proving that it was, in fact, illegitimate. Hence, to remedy this and other mischiefs an Egyptian Law of 1929 was enacted and the courts were not to hear any disputed claims of legitimacy on behalf of a child born more than one year after the terminating of the mother's marriage with the alleged father.

The above is a summary of Coulson's lecture who fails to distinguish between the Jurist's opinion and the law. For example, he holds the views of the Jurists as to gestation period, in the above case, as law, while their views are far from the law. Whereas Abu Hanifa, relying upon Aesha's statement, holds it to be two years, Malik extends it to four years and relies upon a statement of his neighbour, the wife of Muhammad ibn Ajalan, that she conceived three

times and each time the period of gestation covered four years.[24]

To find out the reality we refer to the text. 'The carrying of the child to his weaning', according to the Qur'ānic verse, (**46** : 15) 'is (a period of) thirty months', while the Qur'ānic verse (**2** : 233) says : 'The mothers shall give suck to their offspring for two whole years'. This leaves six months as the minimum period of human gestation after which the child is known to be viable. It is quite in accordance with the latest ascertained scientific facts. Thus the average period is 280 days or ten times the inter-menstrual period.

The law is clear and in accordance with the latest ascertained scientific facts, but Coulson ignores the law and dwells upon the opinions of the Jurists. It seems that he does this purposely or is ignorant of law and in either case his lectures are of no value. He tries to prove that Islamic Law is not realistic and impracticable, while it is most comprehensive and perfect

As to his remark about the system of procedure and evidence that it deliberately restricts the scope of the individual Judge's discretion in the matter of fact-finding, we have to say that 'the cardinal principle underlying the law relating to evidence is that a decree or order of Court should be based as far as possible on certainty and not on conjecture'.[25] 'Conjecture by no means can take the place of truth'[26] is the Qur'ānic verse. 'No validity', says Majalla, 'is attached to conjecture which is obviously tainted

by error'.[27] The fundamental rule is that weight should be attached to certainty and to what may be established by evidence.

Proof is of supreme importance for administration of justice because, as the Prophet said, 'If people's claims were accepted on their face value, some persons would claim other persons' blood and properties ..'.[28] The Prophet warned those who make false claims by saying, 'You come to me for adjudication. Perhaps some of you are cleverer in argument than others. If I should adjudicate in favour of a person against his brother depending upon the former's statements while the latter is really in the right, then I would only be handing the former a piece of Hell. Let him not take it'.[29]

This does not mean that the qaḍi or judge had no discretion. Besides human testimony, other facts and circumstances may also be relied upon as a proof. But circumstantial evidence will only be acted upon if it is of a conclusive nature. For instance, if a person is seen coming out from an unoccupied house in fear and anxiety with a knife covered with blood in his hand and in the house a dead body is found with its throat cut, these facts will be regarded as a proof that the person who was seen coming out murdered him.[30]

'Sometimes documents are accepted as a substitute for oral testimony. But the Court is not to act on a sealed deed or any other document unless it is free from suspicion of being forged and is such as is customary for people to enter their transactions

therein. For instance, official documents and the records of a Court of Justice can be accepted. Books of account kept in course of business and documents executed in presence of two witnesses are also admitted in evidence'.[31]

According to Ibn Qayyim, a judge may give judgment in cases other than those involving the rights of God on the testimony of one man whose integrity is established. He refers in this connection to a statement by Ibn Taymiyya to the effect that the Qur'ān makes no mention of the tetsimony of two male witnesses or one male witness and two females concerning the procedure by which a judge arrives at a judgment, and that Qur'ān merely mentioned this procedure in connection with a person's endeavour to safeguard his right.[32]

The number of witnesses required in a case of adultery is four men ; 'And those who accuse honourable women but bring not four witnesses, scourge them with eighty stripes' is the Qur'ānic Verse.[33] The reason for strictness in such cases is to protect women against false accusations.

In addition to the number of witnesses required in such and other cases there are pre-requisites of trustworthiness to which a witness must conform. Thus the testimony of a person who is notorious for lying or bad character is unacceptable. Regard being had to various reasons which induce men to tell falsehood or the circumstances which prevent them from giving correct and reliable information, the law insists upon certain conditions as necessary : (1) Freedom from bias and prejudice, hence testimony

is not admitted of the father in favour of the son and *vice versa*, of a slave in favour of his master and so on ; (2) General reliability of character, hence persons carrying on certain professions of a degrading nature, such as professional dancers, habitual liars, drunkards or gamblers, etc. are not reliable ; and (3) Maturity of the understanding and power of perception, thus a child, a lunatic, or a blind man in matters which have to be proved by ocular testimony, are declared unfit for testimony.[34]

These are all the essential requirements to ensure that there is no miscarriage of justice.

As regards the testimony of women, two women are considered as one man. This is due to the fact that women are less experienced than men in matters of practical life. 'This has been the case since the ancient days. A number of legal systems did not accept the testimony of women at all, such as the Jewish law ; where it was accepted, there were certain reservations. For example, the legal codes of some of the Swiss cantons, until the beginning of the 19th century, regarded the testimony of two women as equivalent to the testimony of one man, and similarly, in the old French law the testimony of a woman was not accepted as equal to that of a man. Even the Code Napoleon, before it was amended in the latter part of the 19th century, excluded the testimony of women in testamentary dispositions and in a number of transactions pertaining to personal status'.[35]

It is particularly in economic transactions,

therefore, that a woman's testimony is considered as equivalent to half that of man. The Qur'ān, while urging that debts which mature in future should be reduced to writing, says : 'And if two men be not at hand then a man and two women of such as ye approve as witnesses, so that if the one erreth, through forgetfulness, the other will remember'.[36]

According to the saying of the Prophet, 'the testimony of women is permissible in matters to which men have no access.'[37] All the schools accept this principle. These matters include birth, female defects etc. There has been some controversy over the number of women witnesses in such matters. The Hanafi and the Hanbali schools have held that the testimony of one woman is sufficient. They based their ruling on a tradition of the Prophet to the effect that he had accepted the testimony of a midwife concerning a question of birth, [38] and on the fact that the Caliph Ali and al-Qadi Shurayh were reported to have followed suit.

With regard to Jury system, it may be said that in Sharia there is consilium, consisting of a varying number of Jurists who assist the judge and advise him concening legal difficulties arising from the case.[39] The consilium could be present when the case was argued. The ordinary judcial tribunal in Islam is composed of a single judge, but there may be more judges than one. 'Ibn al-Jawzi tells of a practical case representative of the collegial method : 'Ubaydallah al-Anbari and Umar ibn Amir were qadis of Basra ; they met and resolved jointly the lawsuits laid before them'.[40]

The question is whether a judge is entitled to evaluate the testimony presented to him, or is he duty bound to give judgement in accordance with it. There are two views on the subject. The one holds that a judge should give judgement in accordance with their testimony without hesitation or evaluation, while the other regards testimony as no more than a means for investigating and establishing the truth, and therefore a judge is entitled to evaluate it and give judgment according to his evaluation.

The Shari'ah adopts a middle course and regards testimony as binding upon a judge. He has to give judgement without delay, for justice delayed is justice denied. He may, however, postpone pronouncing judgement at the request of the plaintif or in order to bring about an amicable settlement. This procedure is most effective and also sound, for the judge instead of delaying judgement in evaluation of testimony, is provided with opportunity, at the very first stage, to ensure that the testimonies are truthful. The pre-requisites are already laid down for the acceptance of testimony including the trustworthiness of witnesses. The stipulation of trustworthiness gives the judges a wide discretion in rejecting witnesses for bad character and other reasons as set forth before.

The procedure, as above, proves, beyond doubt, the efficiency of the judicature. The remarks made by Coulson that 'the system of procedure and evidence deliberately restricts the scope of the individual judge's discretion in fact-finding' is not correct.

He refers to other forms of extra jurisdiction

i.e. Mazalim jurisdiction in its various forms, which, according to him, is a necessary outcome of the idealistic scheme of procedure and evidence. But Mazalim jurisdiction relates to administrative regulation under the name of Siyasa or the supervising power of the political head to ensure the proper administration of justice to which there is already a reference in the text.[41] Administrative regulation is not fundamental law. It consists of such orders as issued, from time to time, by the political head and these have to be in conformity with Sharia : 'Those who do not make decisions in accordance with that which God has revealed verily they are the disbelievers . . . . the unjust . . . . the transgressors'.[42]

To specify the position of administrative regulation we have to take into consideration the position of the head of the Islamic state who is only the vicegerent of God to enforce His law, hence his orders cannot be in violation of God's law Who is the real Sovereign. Here is the Qur'ānic verse :

'O ye who believe ! Obey God, and obey the Apostle, and those charged with authority among you. If ye differ in anything among yourselves, refer it to God and His Apostle, if ye do believe in God and the Last Day : That is best, and most suitable for final determination'.[43]

The verse clearly points to the fact that whatever the rules and regulations, final determination rests with God and His Apostle. Thus obedience is to God and His Apostle and in the words of the Prophet :

'There is no obedience to the creature if it involves disobedience to the Creator' The Prophet is obeyed, for he never uttereth anything of his own except a revelation revealed to him,[44] and whoso obeys him obeys God.[45] Obedience to men in authority is only next to the obedience to God and to His Apostle. It, therefore, follows that they (men in anthority) will not be obeyed if they themselves do not obey God and His Apostle and if their policies and orders are not in conformity with the letter and spirit of Shari'ah. The Prophet has elucidated this principle in many of his sayings, for instance :

'A Muslim must listen to and obey the ruler whether he approves of what is ordered or abhors it, provided he is not ordered to sin. In that case, he should neither listen nor obey'.[46] 'There, is no obedienc in sin, it is only in virtue'.[47]

The above injunctions definitely point out that in an Islamic state legislature has no right to make laws, the executive has no authority to issue orders and the law courts have no power to decide case in contravention of the text (Qur'ān and the Sunna). The head of state is not the master but the servant of law. The word Siyasa refers to his police powers of watching over judicial administration and no more. Siyasa is not the result of an idealistic scheme of precedure but is already provided for in the text and acted upon by the orthodox Caliphs as explained by Ibn Taymiyya in his works *Al-Siyasa al-Shari'ah*, and *Al-Hisba fi al-Islam* and by Ibn Qayyim in his *Al-Turuq al-Hukmiyy'ah fi al-Siyasa al-Shari'ah*.

The text contains indications as to the solution of all the problems of life. Those only are to blame who cannot understand the text. Here is again an example of Coulson's misunderstanding of law. Referring to an area of Islam, Jazirat ul-Maghrib in Northwest Africa, he says that 'there was a widespread form of land-holding based on an agricultural contract under which the landlord leased the land to a tenant in return for a rental consisting of quota part of the produce of the land. Usually, this quota part of the produce was a fifth, from which the contract takes its name of *Khamessa*. According to pure Shari'ah law the contract of *Khamessa* was a nullity on the ground that rental was too uncertain ; first, it consisted of foodstuffs which were subject to fluctuation in market price ; second, the price value of the portion of one-fifth depended on the quality of the harvest and was unknown at the time the contract was concluded. In the contemplation of the doctrinaire Jurists, this contract was fraught with risk and speculation. Nevertheless, the contract of *Khamessa* was widely practised as something of economic necessity in a society which had little floating capital, and eventually the Maliki qaḍis themselves recognized the validity of the institution, on grounds of necessity, so that it became an integral part of the Shari'ah law as applied by their courts'.[48]

This is the case cited by him to show that idealism of Shari'ah had to surrender itself to the realism, i.e. needs of society. But it is not a surrender, for Shari'ah has already the Rule of Necessity and Need which may be invoked if confronted with hardship

as explained before. His reference to the doctrinaire Jurists that they held this contract of *Khamessa* to be fraught with risk is again a reference to the opinion of the Jurist which is in no way the Shari'ah law. The fallacy of his argument lies in this that he presents the opinion of the jurists as the law itself.

Khamessa is a case of *ijara* or hire which is allowed in Islam because mankind stand in need of such contracts. This sort of contract is valid if both the usufruct and the hire (wages, rent, recompense) be known and specified.[49]

The share of one-fifth of the produce of land cannot be said to be unspecified. Further, there can be no difficulty in getting it measured out of the produce. The reasons which Coulson has given to prove it a nullity seem to be the product of his own inventive brain. If the foodstuffs are subject to fluctuation in market price it cannot affect the contract, for the contract is not for the price, nor is the quality of the harvest an essential factor, for the owner of the land knows full well that his share is one-fifth of the produce at all events. The validity of this contract of *Khamessa* is proved by a parallel contract of *mudaraba* whereby one gives his property or principal to another to carry on business therewith and the profit to be shared between them according to the terms such as one-half of the profit or one-third and so on.[50] The contract of *mudaraba* is permissible in Islam, hence the contract of *Khamessa*. being similar to it. is also permissible.

The profit in *mudaraba* is specified in the same terms as is the produce in *Khamessa*. Coulson's argument that *Khamessa* is a nullity is baseless. He must know that all the needs of human beings are provided for in Shari'ah. The text, if not explicit, is certainly possessed of indications as to all points which guide us in arriving at solutions of the problems in life. For example, there is the Prophet's saying : 'No one except her guardian can give, in marriage, a minor virgin'. The guardian is essentially required in this case but the point is not clear as to whether it is due to her minority or virginity. There is Qur'ānic verse which contains the indication to solve this problem : 'Keep on testing the orphans until they attain the age of marriage. When ye perceive in them the signs of understanding, hand over their property to them' (4 : 6). Here it becomes clear that it is minority and not virginity for which guardianship is required. Thus, solutions for all the problems are contained in the text, what is needed is the profound knowledge of the text, and little knowledge is always dangerous.

Coulson speaks of Shariah law as generally abandoned in the fields of commercial law, general civil law, and criminal law. We have dealt, in the preceding pages, with the intrinsic value of the criminal law of Shari'ah in reducing the number of crimes to almost nil. If any state, under the impact of Western society, disregards it, the law is not to blame. The superiority of Shari'ah law cannot be denied and we have proved its advantages and merits So far as Commercial Law is concerned,

history bears witness to the fact that 'bills of exchange and *hawalah* (instrument for transfer of debt) were not known in Europe before the 12th century A.D. although they had been recognized by all books of Islamic Jurisprudence and particulary the Hanafi books, which go back to the 8th century A.D. It has been said that these instruments were made known to the West four centuries later *via* Italy during the Crusades and *via* Spain when it was still an Arab country. The Arabic influence may be discerned through the imprint the word '*Hawalah*' has left, for it is said that the French word '*aval*' which connotes the endorsement of a bill of exchange by a third person for purposes of guarantees is derived from the Arabic word '*hawalah*', and that the French word '*avaries*' which is used in maritime law to mean damages at sea is also derived from the Arabic word '*iwar*'.[51]

There may by some commercial principles which have been adopted by Shari'ah under the Rule of Necessity and Need. But it is only a tentative arranagment till we find out solutions in the light of Shari'ah. And we have already found out alternatives for insurance and Interest-free banking.[52] Shari'ah is a perfect law and for all time. Coulson often refers to realism and lays great stress upon it. By realism he means that Sharia law be determined by social facts and that Riba (Interest or Usury), speculative transactions and the like be allowed, says he :

'There were also certain areas of the substantive doctrine of the Shari'ah where the idealism of the

Jurists clashed with the practical circumstances of life. Perhaps the most obvious instance of this lies in the doctrine of *riba*. Basically a prohibition of usury, the concept of *riba* had been rigorously and systematically extended by the Jurists to cover, and therefore preclude, any form of interest on a capital loan or investment. Furthemore, since the doctrine was coupled with the general prohibition on gambling transactions, there fell within its ambit all kinds of speculative transactions, the result of which, in terms of material benefits accruing to the parties, could not be precisely forecast. The law had thus come to reject from its ideal scheme of things, types of contracts and business dealings which were in practice the life-blood of commerce and the economy'.[53]

He is wrong in saying that *riba* is basically a prohibition of usury (lending on exorbitant interest), for *riba* means increase or excess whatever it be over the principal. *Riba* applies to interest in all its forms and is prohibited on account of its evils which upset the economy as explained in our works on Insurance and Banking.[54] Speculative transactions are entirely in a spirit of gambling which is expressly prohibited in Islam.[55] Coulson wants that the Islamic society be brought into line with the corrupt Western society, where law is its 'slave' and in a 'state of flux'.

He accuses Shari'ah of idealism. For him, realism is the present state of society to which Shari'ah should conform. But realism is merely a changing phenomenon, and, in fact, a change from bad to worse,

from chaos to crisis. Alarmed at it, sociology has raised its head and is up against the changing standards and values of society. It has directed its efforts to organize society on permanent and scientific basis and to give it a settled form by controlling the social change itself. Under the circumstance, is it wise to accept Coulson's suggestion ? If accepted, will it not disrupt the unity of society ?

He admits, in the very Introduction, that there are conflicts and tensions in Western Jurisprudence which stem from controversy on the fundamental question of the nature of law and are essentially the produce of diverse philosophies of life and political ideologies which have found their vogue in Western civilization and which differ in their view of the ultimate values and purposes of human life'. Such is, indeed, the realism of which he is an advocate and which he recommends for Shari'ah.

To add insult to injury, he blames Islam for its total submission and surrender to Allāh and Islamic Law for its uncompromising spirit. But to make compromise with the Western system is to be victim to the same diverse philosophies of life and political ideologies which shatter the unity of society and have already split it into fragments which Comte, the father of Sociology, proposed to weld together under a generalized science of man and society. But it has remained only a dream as human motivations and behaviour patterns appear far too complicated for scientific generalizations.

It is Islam which has already solved this

problem by moulding society into the pattern of its law which not only precedes it but also controls it. Further, its well devised norms of vice and virtue, good and evil keep the social change within bounds. Thus, Islam has been successful in preserving the unity of society. The West and Sociology itself have to adopt the principles of Islam and its law to solve their problem. Shari'ah has to remain in its ideal form to serve as a model for the entire world and admittedly a model cannot change. Here lies the secret why Shari'ah is immutable, a fact which short-sighted Orientalists cannot comprehend and if, at all, they comprehend, their biased mind seeks to suppress its beauty and, thus, to rob it of its distinctive and divine character. 'Their intention is to extinguish God's Light (by blowing) with their mouths : but God will complete (the revelation of) His Light, even though the Unbelievers may detest it'. (61 : 8)

(e) Law and Morality (Fifth Lecture)

In this lecture, dealing with the problem of law and morality, Coulson refers to a decision of the House of Lords in Shaw v. the Director of Public Prosecutions, 1962. Mr. Shaw had compiled a booklet entitled *Ladies Directory*, which listed the names and addresses of prostitutes and included nude photographs and brief indications of their particular sexual practices. Apart from being guilty of publishing an obscene article, Mr. Shaw was also convicted of the offence of conspiring to corrupt public morals. This last offence stimulated discussion of the funda-

mental question : Is it the function of the law to enforce the standards of conventional morality by punishing deviations therefrom, particularly in cases of sexual immorality in private which does not occasion harm or offence to other persons ?

Coulson stops short and does not refer to the report of the Wolfenden Committee where the same problem was raised and the Committee recommended by a majority of twelve to one, that homosexual behaviour between consenting adults in private should no longer be treated as a criminal offence.[56] Such is Western society.

He admits that Islamic law embodies the principle of strict enforcement of sexual morality in the severe punishment it prescribes for the offence of *Zina*, or fornication. He proceeds further and says, 'Islamic Shari'ah is, in our terminology, both a code of law and a code of morals. It is a comprehensive scheme of human behaviour which derives from the one ultimate authority of the will of Allāh ; so that the dividing line between law and morality is by no means so clearly drawn as it is in Western societies generally. This is why, for example, such importance and significance attaches to the pronouncement of Jurists on current problems like contraceptive birth control. Still, Islam does observe the distinction, in the narrow field of sexual behaviour, between the rule which is enforced by the law as applied by the courts and the rule which finds its sanction only at the Bar of eternity. And I turn now to the broader issue of law and morality in Shari'ah doctrine as a whole. How far does Muslim Jurisprudence,

both past and present, distinguish between behaviour which is ethically desirable and that which is legally enforceable ? Or how far does it insist that it is the duty of the courts to compel a person to behave as ideally he ought to behave' ?

He, then, remarks that in the Qur'ān there is no clear or consistent distinction between the moral and the legal rule. 'The Qur'ān is concerned with fundamentals—to distinguish right from wrong, good from bad, proper from improper. It does not usually proceed to the secondary stage, of clothing norms of behaviour with legal consequences. In some cases, it is true, precise legal sanctions are imposed for an act or omission—such as the penalty of flogging for serious defamation or that of amputation of the hand for theft. But in general the Qur'ānic precepts merely indicate those standards of conduct which are acceptable or not acceptable to Allāh and express their results in terms of Divine favour or disfavour. Thus wine drinking is a 'sin' and an 'abomination' ; usury is 'forbidden' (haram) ; a wife's obedience to her husband is a 'virtue' ; those who wrongfully appropriate the property of orphans 'shall burn in the flame'.[57]

Referring to the real values and standards by which society lives, he states that these are not always and not merely those that the courts will enforce. There are often more powerful forces to compel the observance of standards of behaviour than legal coercion. In traditional Islamic society a consciousness and an acceptance of the standards of religious morality was instilled into the population at large through

the great influence wielded by men of religion in public and private office—through the religious teachers in educational establishments, through the imams of the mosques and the institution of the Friday sermon, and through the muftis, or jurisconsults, whose advice given in a public or private capacity often indicated how the ethical principles of Islam were to be implemented in the practical circumstances of life. Moreover, a special public office existed in traditional Islam for the precise purpose of ensuring the observance of the rules of religious practice and morality. Known as the Muhtasib, this official watchdog of public morality had a roving commission to fulfil the task described in the Qur'ān 'urging to the good and dissuading from the bad' (al-amr bil-ma'ruf wa'lnahy 'an al-munkar), and had limited powers of summary punishment of offenders. On the broadest view of Islamic society, therefore, law and religious morality are often inextricably merged into a general philosophy of life ; there is in fact coercion to observe the moral as well as the legal standard'.[58]

From the above it will be seen how inconsistent is Coulson's speech. He started his lecture with a reference to Shaw's case to show that the function of law is to enforce morals and also admitted that Islamic law embodies the principles of strict enforcement of sexual morality in the severe punishment it prescribes for the offence of fornication and, then, referring to the Qur'ān he says that it is concerned with distinguishing right from wrong and does not

proceed to clothe these norms of behaviour with legal consequences. He blows hot and cold in the same breath in that he admits the severe punishment prescribed by the Qur'ān and in the same vein remarks that the Qur'ān is merely concerned with distinguishing right from wrong. Again he admits that there are precise legal sanctions for such offences as serious defamation and theft but wine drinking, usury, wrongful appropriation of orphans' property are described in terms of only divine disfavour. Perhaps he is unaware of the fact that wine drinking was punished by the Prophet himself and his acts are complementary to the Qur'ān. Further, those who misappropriate the orphans' property are liable to be sued in the courts of law and have to make good the loss. Usury being of a grave nature is left to be punished by God alone.

With regard to the above offences Coulson remarks that they are not accompanied by legal sanctions but soon after this he confesses, as mentioned above, that 'There are often more powerful forces to compel the observance of standards of behaviour than legal coercion' and particularly refers to the Muhtasib calling him the official watchdog of public morality. Thus, according to his own statement, public morality is enforced by several means which include courts of law. Further, what right has he to object in principle, to the ways in which God carries out His scheme ? God is the Sovereign and has the sole authority to prescribe punishments for offences to be enforced by the courts of law, or by any other means, or to reserve such enforcement

for Himself. Coulson must know that every legal system is oriented towards certain purposes which it seeks to implement in its own way, hence he is nobody to object to it particularly when it is God's way of implementing His scheme. Coulson is wrong to consider divine law in terms of man-made laws. He seems to have ignored the fact that apart from *qisas*, punishments are divided into two classes : one of which is called *hadd* and other *taazir*. *Hadd* means measure, limit and, in law it means a punishment, the measure of which has been definitely fixed. In *taazir* on the other hand, the court is allowed discretion both as to the form in which such punishment is to be inflicted and its measure.

The law, while confirming *hadd* as the extreme punishment for certain crimes, has laid down conditions of a stringent nature under which punishments may be inflicted and, in fact, there are only a few instances known in which *hadd* has been inflicted. Punishments by way of *hadd* are of the forms such as Death by stoning for Adultery, Amputation of hand for Theft, Flogging by a hundred stripes for Fornication and by eighty stripes for Drunkenness and Calumny. The policy of law on such cases is to punish only such offenders who defy public decency and openly flaunt their vices.

Taazir may be inflicted for offences against human life and body, property, public peace and tranquillity, decency, morals, religion and so on. This sort of punishment falls under al-Siyasa al-Shari'ah or state policy as already explained before.

The nature of sentence to be inflicted by way of *taazir* for particular kinds of offences may be regulated by the head of the state. But he himself has to obey the law of God, hence cannot frame administrative rules in contravention of the fundamental law, nor has the authority to permit what is prohibited or prohibit what is permitted.

The objects of *tazzir* are the correction of the offender and the prevention of the recurrence of the crime. There are instances of breaking to pieces wine containers and wine extracting instruments as a punishment in the days of the Prophet which may serve as examples to close the banks where *riba* (interest or usury) is prevalent and hold all such transactions as *null and void* and also to punish the offenders who defy religion and morality. Hence it cannot be said that there are no legal sanctions for wine drinking, usury etc.

For Coulson, the general problem of the relationship between law and morality involves the question of the extent to which the law should concern itself with the intent or motive underlying the outward act. On this issue he says that the schools have two distinct approaches. One approach is that the legal effect of an act or transaction must depend upon the motive or the intent which inspired it. This is the moralist attitude of the Hanbali school. The other approach is that it is not for the law to attempt to burrow inside the mind of the parties, it must accept and regulate their actions at their face value. This is the formalist attitude of the Hanafi school.

In this regard he puts forward some instances of cases chief among them being the so-called legal trickery, or *hiyal* of no great ingenuity, with the blatant purpose of circumventing an established rule of the substantive law. He takes his final example of Islamic legal trickery from the field of family law. A husband who has divorced his wife by repudiation three times, whether on the same or separate occasions, is not allowed to remarry her. A bar to marriage arises between a couple so divorced which is only removed if, after the former wife's marriage to someone else and the consummation of the marriage, that marriage is terminated by due process of law. Such an intervening marriage on the part of the former wife is said to 'make her lawful' again to the former husband who had repudiated her three times. Hence there arose in practice the device known as '*tahlil*', or 'the process of making the wife lawful' again to her former husband by a sham intervening marriage. Those who offered their services for this purpose were known as *muhallils*, or 'those who make the divorced wife lawful to her former husband'. They were usually eunuchs or boys below the age of puberty, who divorced by repudiation the woman they had ostensibly married as soon as the contract of marriage was concluded. These temporary marriages of convenience were recognized by the law as an effective stratagem to remove the bar to remarriage existing between a divorced couple.

The Hanbali school, says he, alongwith the Malikis, condemned the '*htyal*' (legal trickery) but Hanafi law, and Shafi'i law, taking the activities of the parties at

their face value and not inquiring further into the intention behind the overt act, accepted the *'hiyal'* as legally effective. It may be, he remarks, that the *'hiyal'* effected a socially desirable purpose. But to countenance them on this ground was to deny the fundamental principle of Jurisprudence that the ends or purposes which law should serve were a matter for decision by Allāh alone. In any event, to suggest that the Shari'ah courts should in this way connive at a manifest illegality was to make a mockery of their role as guardians of the standards of Shari'ah law.

To him, this seems to be the reason why Shari'ah has been abandoned and this is particularly evident in the reforms which have taken place, in the Muslim world in the matters of divorce and polygamy etc. But these reforms are inadequate interpretations of Shari'ah and cannot be taken for Shari'ah Law.

Further, he is mistaken in considering 'hiyal' as recognized by law. Jurists' opinions are never a law as explained before. It is a pity that he should fail to distinguish between the opinion and the law. He says that 'hiyal' are upheld by Hanafi and Shafi'i schools, while Imam Muhammad ibn al-Hasan (al-Shaybani), the companion of Abu Hanifa is averse to legal fictions which result in the defeat of rights.[59] Shafi'i is reported to have objected to legal fictions. Everyone acquainted with his life and integrity is aware of his aversion to fictions.[60]

Malik and Ibn Hanbal and their fellowers opposed legal fictions and Ibn Qayyim condemned

them, for they violate the spirit of Shari'ah and constitute its contradiction. According to the Prophet's saying 'Acts are determined by intention'. The legal fictions are expressly based upon evil intention and, therefore, condemned.

So far as intention and outward expressions are concerned Qaḍi Baydawi has explained that intention means mental inclination towards something that accords with our purpose, whether it be to gain profit or to overcome some harm, presently or subsequently.[61] To some Will is the source from which stems the human action. The meaning of intention is, therefore, the Will directed towards the action. For example, if a person fires a shot at another with the intention of hitting him and does hit him, the perpetrator is said to have willed the action of firing and intended to hit the other person.[62] The measure for judging the act of a person is his intention or the Will to act. For this very reason the Prophet has said :

'Beware there is a piece of flesh in the body. If this is in sound state, all other parts will function well. If it is disturbed, the whole body will be disturbed'. Let it be known that this is the heart (Will).

According to the Classification of Subki,[63] as given by Mahmassani, intention is divided into five phases. The first is *al-hajis* or the first impact of the intention upon the heart. The second is *al-khatir* where intent permeates the heart. The third is *hadith al-nafs* where a person oscillates

between the thought of committing the act and that of refraining therefrom. The fourth is *al-hamm* where the intention to commit the act overshadows the thought of refraining therefrom. The fifth is *al-azm* where the intention is solidified by the Will and the determination to implement the act.

The first two stages are not included in the category of the Will or the choice of action, therefore they do not carry a liability either, in line with the Prophet's saying : 'My people may be excused for their self-talk (ma haddathat bihi nufusuha)'.[64] A person is also not answerable for the fourth state in compliance with a tradition of the Prophet : 'A resolve (hamm) to do good is registered as a pious deed, while a resolve to commit evil is not registered as an evil'.[65] The fifth and the last stage, according to Mahmassani, is controversial,[66] but a person is not answerable for any of the five stages of intention so long as it is not given overt manifestation. Intention only becomes important if it is coupled with action.[67]

An act is judged in the light of the intention or the purpose it seeks to effectuate as said the Prophet : 'Acts are determined by intentions'.[68] Hence, in the event of a difference between the intention and the outward expression the judgement should be given in accordance with the intention to the extent it is ascertained. As a natural corollary intention must be known if it is to be effected and if there is difficulty in ascertaining the intention, effect should be given to the outward expression.

The Prophet says : 'We give judgment on the basis of the apparent, God takes care of the inward intention'.[69]

From the above it is evident that the knowledge of intention is important to determine the acts. In the case of '*hiyal*' intention is quite apparent from the facts such as 'the services of eunuch' to 'make the wife lawful', as we have seen in the example presented by Coulson. The purpose of Shari'ah in imposing the condition of consummation of marriage is to warn againt the reckless use of the power to dirvorce. This very purpose is defeated if eunuch is to consummate marriage who is, in fact, unable to do it. Such '*hiyal*' are clearly contradictory to Shari'ah. If these are accepted by some of the Jurists it is their utterly wrong opinion and cannot be cited as law.

(f) Stability and Change (Sixth Lecture)

This lecture is nothing but repetition, in a new form, of what he has said before. His lectures, so to say, are the jugglery of words. The art of presenting the same rulings of the Courts and the opinions of the Jurists as law has reached its climax in this lecture. What Coulson wants is that Islamic Law be rationally interpreted and reduced to the position of man-made law. It pleases him to see the law change according to the changing society and become subservient to it. But why should the law change when it can accommodate the changing conditions ? There is one fact, related by him in this lecture,

which stands out boldly to prove his wrong view—A. R. Cornelius, the former Chief Justice of the Supreme Court of Pakistan, appreciates the value of Islamic Law and 'has expressed himself in favour of the reintroduction of amputation of the hand as the ultimate penalty for theft',[70] but Coulson disparages the law and stands for change. Who is right in his judgment, a person unable to distinguish between an opinion and law, or a Chief Justice well-versed and most experienced in law ?

In Shari'ah, as we have already explained, there is neither conflict nor tension. Coulson is wrong in taking the divergence of opinion among the Jurists to be the conflict and tension in law.

20

KERR'S ISLAMIC REFORM

(a) Idealism in Traditional Jurisprudence

In his book *Islamic Reform* Kerr has dealt with the Political and Legal Theories of Muhammad Abduh and Rashid Rida. For him, there are ambiguities in traditional and modern social thought and the Juristic theory of the Caliphate and Traditional Jurisprudence are nothing but idealism.[1] To start with he says :

'Underlying the Islamic tradition of social thought is a pessimistic consciousness of the tension between ideal and actuality, the spiritual and the temporal, virtue and power, God's command and man's behaviour. In past centuries Muslim scholars did not customarily think it their business to reconcile these two sets of contrasting elements. Instead they elaborated their conceptions of the ideal and left Islamic society to cope with actualities by evolving its own practical, but largely unacknowledged, psychological and social mechanisms. But the spread of secular culture in the modern Muslim world has changed this. Instead of rendering the sense of tension obsolete, it has sharpened the tension, and made its resolution a vital problem'.[2]

He has, thus, taken a wrong view of Islamic Law. The social thought and the supposed tension therein have nothing to do with the law of All-Wise God which precedes the society and to which society has ideally to conform. To Kerr, as for Coulson, divine law is the opinion of the Jurists and divergence therein is taken for conflicts and tensions in the law itself. They are both, primarily mistaken in considering divine law in human terms. The efforts of Jurists, in interpreting divine law, are to comprehend and discover the law and not to establish or create it.

Divine law is to be preserved in its ideal form as commanded by God,[3] or else it will be devoid of its capability to control society which is its chief purpose. The mistaken view of the Orientalists is due mainly to the fact that the real good may be rationally known and that the law should be determined by social needs, while all such needs are provided for in divine law and God alone knows what is really good for mankind. The law being perfect and for all time,[4] social needs are to be determined by it and not *vice versa*. Such being the case no question of change can arise, nor is any tension in Shari'ah.

Orientalists are unaware of the fact that the Divine Law, if applied in its totality, controls the social change and keeps it within bounds, for the law does not allow the society to stray from its moorings. Islamic society, be it remembered, is the product of law and has ideally to conform to its dictates. The law, as already stated, does not change yet is possessed of amazing capacity to

accommodate change. Such changes rarely occur. According to Moore, a new discovery, invention and cultural contact may give rise to change but they all can be met with under the Rule of Necessity and Need. The progress of society is not retarded under Shar'iah, but is made healthy, as the corrupt element is discarded by law. Invention or new discovery, for instance, atomic energy has its uses and abuses, Islam adopts its uses that contribute to the welfare of society, and rejects its abuses.

Kerr is wrong in his remark that Muslim scholars in the past, did not think it their business to reconcile the contrasting elements. They were on the other hand, right in their efforts to preserve the law in its ideal form, for it serves as a standard of judgment and automatically sets aside contrasting elements : 'If you differ in anything among yourselves, refer it to God and his Apostle.'[5]

The remarks made by Kerr are exceedingly strange. He assigns the position of a sovereign to the interpreters of divine law and emphasizes the need for an agency that can authoritatively decide what God's decrees are? Says he :

'In the classical Islamic Theories of the Caliphate and Jurisprudence the starting point is the assumption that rights and obligations are determined and revealed by God, and that therefore He — or the divine law He reveals — is the ultimate sovereign. The revealed law must in turn be interpreted and applied by qualified individuals, and in the secondary sense these are sovereign. Attribution

of ultimate sovereignty to God, of course, in itself is of no practical significance until some agency is identified that can authoritatively decide what God's decrees are. The locus of sovereignty on the secondary plane thus becomes crucial, for it is here that the character of the constitutional and legal systems as functional instruments will be determined'.[6]

Here he speaks of sovereignty in terms of ultimate and procedural sovereignty and marks a distinction between the two. Nowhere in political thought can be found such a novel idea. He must know that sovereignty is indivisible and God is Most High and none can think of a division in His Sovereignty. He cannot come down personally to nominate any special class or individual to enforce His Law, hence it is the duty of qualified individuals to interpret and apply the law as directed by God : 'Verily We sent down to thee the Book in a proper form that thou mayst judge between men as guided by God' ;[7] 'And those who do not judge by what God hath sent down are indeed transgressors'.[8] Thus, the task of interpretation and application of law is to be undertaken by such as are qualified to do it, and they have to do it as guided by God and in strict conformity with the letter and spirit of the law. In case of any dispute or difference of opinion the final decision rests with God : 'And whatever the subject of your dispute, its final decision rests only with God'.[9] The sovereignty of God, as such, is definite and indivisible.

He speaks of some agency that should be identi-

fied to authoritatively decide what God's decrees are. This means that there should be a sacredotal class, while Islam does not recognize priesthood or any sacredotal authority and as such the question of a theocracy is simply rejected. No man or class of men is privileged with a private relationship with God, Islam does not countenance sacredotalism in any form. Kerr, it seems wants to introduce in Islam, the long Western struggle between State and Church.

To him, the law means man-made law and he puts a question : 'Is the Islamic Sharia, as traditionally conceived, a system of positive law ? Religious morality and positive law can, of course, coincide. In positive terms, however, they cannot be one and the same thing, and law that is not humanly enacted and recognized, and whose observance is not ascertainable by human faculties, is not law'.[10]

This is his self contradictory statement. In paragraph 3, at page 4, which we have quoted above, he speaks of Shari'ah as divine law and here he says that Shari'ah is not a law. For him, the word law applies to what is humanly enacted and recognized, while divine law is admittedly a superior law. He speaks of positive law but it cannot remain positive as it is determined by social facts which are subject to change. Thus his positive law is, in fact, law in flux and not stable, yet he calls it a positive law and criticizes Shari'ah for not being positive in this sense. If he could only know the meaning of the word 'positive', he would not have passed such sweeping remarks on Shari'ah.

Under Chapter 8 we have referred to some of his remarks which betray his ignorance of law. What he intends is that human reason be given free reins in the interpretation of Shari'ah, and social facts be the finally determining factors of Shari'ah law and 'no middle ground'. Says he :

'The shift from traditional Islamic piety and acceptance of what was presumed to be divinely ordained social order to the new ethos of 'social engineering' — from the idea of divine voluntarism to that of human voluntarism — is symbolized, if not exactly explained, in the failure of the Islamic reformists of Muhammad 'Abduh's and Rashid Rida's generations to establish a middle ground. In Europe the corresponding theological tradition of divine voluntarism had gradually yielded either to the Thomist theology of natural justice or, later, to its secular derivative long before human voluntarist philosophies emerged. The latter have had their modern triumphs, some of them parading under superhuman banners and accordingly repulsive, but others tempered by traditions of civility. In the Islamic world the pace of change has been so fast — pressed, significantly, by manifestations of West's will and power rather than its reasonableness— as to induce a transformation of attitude straight from the passivity of Ash'arism to the assertiveness that characterizes contemporary nationalism. In this process, the intellectual reformers who sought to provide answers to the most modern needs by fanciful appeals to the earliest period of Islamic history inevitably tended to fall between two stools,

alternatively giving rise to impotent protests against the rootlessness of the modern social order or providing fuel for its militancy and self-esteem.'[11]

Let us clarify the point that Islam and its laws are to set right the social order of the world and not to be reformed and moulded by it. Those who think of reforming or modernizing Islam are misguided and their efforts are bound to fail. It is well said that Islam modernized ceases to be Islam. Why should it be modernized when it is already perfect and pure, universal and for all time ? Since God is perfect, the law and religion revealed by Him cannot be imperfect but essentially perfect and for all time.

PART V

(ISLAMIC LEGAL SYSTEM AS COMPARED WITH THE LEGAL SYSTEMS OF THE WORLD)

* Comparative Law
* Romano Germanic Family
* Common Law Family
* Family of Socialist Laws
* Religious and Traditional Systems
* Islamic Legal System

21

COMPARATIVE LAW

(a) The Object

The object of studies in comparative law is to understand the outlook of others and help others to understand our own point of view. There is a variety of legal concepts at the present time. The world of today is not the same as it was a century ago where everyone agreed to recognize the pre-eminent position of Western Europe, and when it seemed that international relations were to be organized only through the Roman tradition. Comparative law constitutes an instrument for a renewed study of our own legal system and helps us in clarifying our ideas concerning the latent characteristics of our own law.

Each political society in the world has its own law. It frequently happens that several laws co-exist within the same state. There may be, in addition to a federal law, the laws of states, provinces or districts as in the United States of America. This diversity poses a problem which may seem insoluble to an understanding of foreign laws but, according to David and Brierley, there is one factor which facilitates the task of comparativist — he can find out amidst the wide variations of particular laws, the existence of a limited number of general cate-

gories within which these different laws can be grouped.

(b) Families of Law in the World Today

Following the above principle, the laws existing in the contemporary world are grouped by David and Brierley, authors of *Major Legal Systems in the World Today* under three principal families : (1) Romano-Germanic Family, (2) Family of the Common Law, and (3) Family of Socialist Laws.

22

(1) ROMANO-GERMANIC FAMILY

This group to which French Law belongs includes those countries in which legal science has developed on the basis of Roman Law. Here the rule of law is conceived as a rule of conduct intimately linked to ideas of justice and morality. The law has evolved primarily as an essentially private law, as a means of regulating the private relationships between individual citizens, other branches being of comparatively recent development.

'The Romano-Germanic family of laws originated in Europe. It was formed by the efforts of the European Universities which, from the 12th Century and on the basis of the compilations of the Emperor Justinian evolved and developed a juridical science common to all adapted to the conditions of the modern world. The term Romano-Germanic is selected to render homage to the joint efforts of the universities of both Latin and Germanic countries.'[1]

The laws of this family are in no way a copy of Roman Law, for many of their elements come from sources other than Roman law. The family, at present, is spread throughout the entire world. 'Far exceeding the boundaries of the ancient Roman

Empire, it has in particular, conquered the whole of Latin America, a large part of Africa, the countries of the Near East, Japan and Indonesia. Part of this expansion is owed to colonization and part to the ease with which the legal technique of codification, generally adopted by the Romanist laws of the 19th Century, has permitted its reception'.[2]

(a) The Germination

The germination of the Romano-Germanic system which took place in the 12th and 13th centuries was in no way a result of the affirmation of a political power, nor the effect of centralization brought about by a sovereign authority. The Romano-Germanic system thereby differs from Engish Law where the development of the Common Law was bound up with the progress of royal powers and the existence of strongly centralized royal courts. Nothing similar is observed in continental Europe. On the contrary, the Romano-Germanic system asserted itself at a time when there was no European political unity. 'The Romano-Germanic system was never founded on anything but a community of culture. It came into being and continued to exist independently of any political ambitions — a point to be fully realized and emphasized'.[3]

There never was a uniform law in Europe. It is the Romano-Germanic system which served to unite the peoples of Europe, while, representing their diversity. The Jus Commune of continental Europe greatly differed from the Common Law of

England. The former is flexible, while the rigidity of the latter called for rules of equity to supplement it. Such a need was never felt in the Romano-Germanic family.

The idea that society must be ruled by law and submit to the rules of reason was accepted by the Romans. But in the 12th cantury, the return to this notion was revolutionary as philosophers and Jurists demanded a new law founded on justice which Reason had revealed. Thus, the Law of Justinian became a law founded on Reason to suit universal application. A new school, the Natural Law School appeared in the Universities in the 17th and the 18th centuries.

(b) Natural Law School

'The Natural Law School completely renewed the concept of law by the acceptance of an idea of individual rights (droits subjectifs) entirely foreign to the Roman tradition. This revolution, however, did not destroy the basic unity of the Romano-Germanic system, because all the universities took part in the formation and popularization of the new doctrine which exerted a comparable influence in all countries. Further, the Natural Law School defined the idea of a universal, unchanging law, common for all time and to all countries. This idea reinforced the merging tendency of local and regional customs ; the European legal community, in adhering to the same moral and philosophical principles, was strengthened by this amalgamation and the revision of law which it occasioned'.[4]

The Natural Law School did not demand the abandonment of Roman Law but required that the rules of Roman law be received and applied on condition that they be not contrary to reason and justice. The School is marked for the role it played in formulating a public law, giving effect to the natural rights of man and guaranteeing the liberties of the individual, and for the stress it laid on codification to put an end to the fragmentation of law and multiplicity of customs.

(c) Codification and Legal Rule

Codification refers to the body of laws so related to each other as to avoid inconsistency and overlapping. To the Romano-Germanic notion, a code should not attempt to provide rules that are immediately applicable, but rather an organized system of general rules from which a solution may be easily deduced by as simple a process as possible. It is the optimum generality of the rule that is aimed at. The rule must not be too general for then it would no longer be a sufficiently certain practical guide ; on the other hand, it must be general enough to cover a certain series or type of situation rather than merely apply to some particular situation as does the judicial decision.

Speaking of Code Law, referred to above, and the Case Law of England, Friedmann says, that 'at the first sight, the difference between a codified and a case law system appears fundamental. A code law states the law comprehensively, in general principles, and the finding of the law in an individual case is

deductive, an application of general principles to particular facts. A case law system, on the other hand, develops tentatively, and truly casually ; the principles crystallise slowly from decisions in particular cases, and the method of law finding proceeds inductively from the particular to the general'.[5]

Owing to the distinct failure of some attempts at codification to solve all conceivable problems by thousands of minute provisions on every contingency, modern codes have preferred to state the law in general principles and to leave the solution of the particular cases to the intelligence of those administering the law.[6]

(d) Sources of Law

There are many laws within this family which make it diffcult to present the theory of the sources as practised in this family. Among other sources such as custom, decided cases, legal writing, supereminent principles, there is enacted law or legislation, apparently the primary and almost exclusive source of law today in countries of the Romano-Germanic family.

Under modern conditions, and for philosophical and political reasons it is generally thought, in these countries, that the best means of achieving justice is to rely upon the provisions of enacted law.[7]

(e) Interpretation of Legislation

The practical value of enacted law depends on the way in which it is applied. The application of

law supposes a process of interptation and the most varied methods have been recommended in the countries of Romano-Germanic family, from a strictly exegetical interpretation to the theories of the School of Free Law (Freies Recht). Legislators, with great wisdom, have never imposed particular methods of interpretation and the rules established on the subject in each country leave a wide latitude to the interpreters. The main concern is to arrive at just solutions, and to this end the different doctrines are combined, avoiding any individual adherence to the view-point of any one theorist.[8]

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(2) COMMON LAW FAMILY

(a) Common Law Defined

Common Law may be defined as a uniform system for the whole of the Kingdom of England which the Royal Courts of Westminster imposed by displacing local customs. A study of the Common Law must begin with a study of English law which occupies an eminent place within the family of the Common Law. Much of English law was formed out of the customs of the people. A knowledge of history is, therefore, indispensable for an understanding of English law, but lack of space does not allow us to go into details. Suffice it to say that the law of England did not experience a 'renewal' through Roman law nor was it transformed by means of codification — the two characteristic features of French and other laws of the Romano-Germanic family.

The English Jurist likes to emphasize the historical continuity of his own legal system because he sees in it the proof of the great wisdom of the Common Law, its ability to adapt, its lasting value and those qualities that correspond to the nature of English law and English people

generally. The truth is that the English like to emphasize the traditional character of their law.

The Common law forms the second family of law, including the law of England and those laws modelled on English Law. 'The Common law, altogether different in its characteristics from those of the Romano-Germanic family, was formed primarily by judges who had to resolve individual disputes. Today it still bears striking traces of its origins. The Comman Law legal rule is one which seeks to provide the solution to a trial rather than to formulate a general rule of conduct for the future. It is, then, much less abstract than the characteristic legal rule of the Romano-Germanic family. Matters relating to the administration of justice, procedure, evidence and execution of judicial decisions have, for Common Law jurists, an interest equal, or even superior to substantive rules of law because historically their immediate preoccuption has been to re-establish peace rather than articulate a moral basis for the social order. Finally, the origins of the Common Law are linked to royal power. It was developed as a system in those cases where the peace of the English Kingdom was threatened, or when some other important consideration required, or justified, the intervention of royal power. It seems, essentially, to be a public law, for contestations between private individuals did not interest the Common Law courts save to the extent that they involved the interest of the Crown or Kingdom. In the formation and development of the Common

Law — a public law issuing from procedure — the science of the Romanists founded on the *droit civil* played only a very minor role : the divisions of the Common Law, its concepts and vocabulary, and the methods of the Common Law lawyer, are entirely different from those of the Jurists of the Romano-Germanic family'.[1]

The Common Law has experienced a great expansion throughout the world on account of colonization and reception. But there may be traced a distinction between the Common Law in Europe and that outside Europe. In certain countries, for example, some of the Muslim countries, India, it has been partially received, while the different environment has ultimately created differences between the Common Law of the countries where it originated and those into which it was imported such as the United States of America and Canada.

(b) Common Law and Equity

In contrast to the Romano-Germanic system which contains private and public law, the whole of English law is considered to be public law as specified above. Again there is the fundamental distinction between the Common Law as supplemented by Equity which is unknown to the laws of the Romano-Germanic family. Equity is a body of rules evolved mainly in the 15th and 16th centuries and applied by the court of the Chancellor in order to complete, and occasionally to correct, the Common Law system which had become insufficient and defective.

(c) Origin of Equity

The origin of equity may be traced to the ideas of the Middle Ages to request the King to intervene and to render a decision that would remedy the administration of Justice. The King as the fountain of Justice had to intervene in cases where the legal techniques were deficient. In a general sense equity means fairness in the adjustment of conflicting interests, or the application of principles of good conscicnce to the settlement of controversies, *i.e.*, natural justice. In the special sense adopted by English lawyers, equity means that portion of natural justice which, though capable of being enforced by the courts of common law, was originally enforced only by the Court of Chancery. Equity as thus understood had been described as 'a gloss (meaning a supplement) on the Common Law', filling in the gaps and making the English legal system more complete.

Those who were unable to obtain justice in the Common Law courts sent petitions to the King which sometimes were examined by the King and his Council and relief was granted or refused. Later, due to pressure of business in the Council, the petitions were sent to the Lord Chancellor, who as the Chief Secretary of State, dealt with them alone.[2]

Despite its early popularity, equity as administered in the Chancery was subject to criticism. Its initial flexibility led to uncertainty in the 17th century. Flexibility was advantageous, for it gave relief from the rigidity of law, but could be

disadvantageous and dangerous if it led to uncertainty and hardship. Equity had, therefore, to follow a certain procedure and with the passing of the Judicature Acts 1873-1875 all Engish Courts were able to order the equitable remedies as well as apply the rules of Common Law. Thus dualism of law and equity was eliminated.

(d) Concept of the Legal Rule

English Jurists speak of their law as essentially a case law. 'The English legal rule is situated at the level of the case for which — and only for which — it has been in fact found and enunciated. If it were placed at a higher level, it would make English law 'doctrinal' and greatly distort it. The English are very naturally hesitant to bring about such a transformation and, in particular, they only truly adopt the relegislative rules, if they are not absolutely clear and obvious, when they have in fact been interpreted by the courts. The judicial application of such rules then takes the place, as it were, of the provisions the legislators have enacted'.[3] The function of the judge is to render justice, not to formulate general rules whose application might exceed the case before him. The judge is supposed to be essentially unfettered by statute, but hemmed in by precedent.

(e) Rule of Precedent

In the Romano-Germanic family decided cases may have some authority but are not considered to contain rules of law, for there is already the code

and sufficient legal system. 'The situation is quite different in England where the authority of Roman law was never recognized in the same way as it was on the continent. The Common Law, created by the royal courts of Westminster, is a 'judge-made' law. The role of judicial decisions has not only been to apply but also to define the legal rules. In such conditions it is only natural that in England the judicial decision should have gained authority quite different from whatever position it may have in Europe. One could almost say, in fact, that apart from judicial decisions there is no law in England at all. The rules set by decided cases must be followed or else the certainty of the Common Law will be destroyed and its very existence compromised'.[4]

Theoretically the analysis of the rule of precedent amounts to three simple propositions : (1) The decisions rendered by the House of Lords are binding precedents to be observed by all other courts ; (2) the decisions of the Court of Appeal are binding precedents for all courts, except the House of Lords ; (3) The decisions of the High Court of Justice must be observed by lower courts and, although not obligatory, have a very great persuasive value and are generally followed by the different divisions of the High Court of Justice itself.[5]

Common Law provides the basis of the English legal system, legislation is considered to be a second source. Since the rise of the Parliament which can make and unmake laws to any extent, situation has changed to a large extent in this respect. In England

today statutes are the work of Parliament, which is sovereign body representative of the nation. The statutes are given complete respect and judges apply them to the letter.

In addition to court decision and statute, custom is the third source of law and inferior to the first two. Reason helps to fill the gaps of the English legal system as well as to guide its evolution, hence it is frankly recognized as a subsidiary legal source.

(f) Role of Reason

'The role of reason, while in theory only subsidiary, is in reality one of primary importance. The merit of the Common Law is in fact that it has remained over the centuries the 'perfection of reason' (to cite the statement of the Year Books). English Jurists, dismissing as dangerous too close an attachment to precedents, have maintained, save at certain periods, the truth of Coke's statement that 'Reason is the life of the Law ; nay, the Common Law is nothing else but reason'.[6]

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(3) FAMILY OF SOCIALIST LAWS

(a) Revolutionary Nature

This family is distinct from Ramano-Germanic and the Common Law families in its revolutionary nature. The Maxist doctrine, founded by Marx (1818—1883) and Frederick Engels (1820—1895), is based upon materialism and the idea of evolution. To Engels, 'Matter is the only real thing in the world'. Marx believed not only in the materialistic conception of history but maintained the doctrine that in any given epoch, the economic and material relations of society—the means whereby men and women provide for their livelihood—exert a preponderating influence in shaping the progress of society and in moulding the political, social, intellectual and ethical life of the community.

(b) Law only a Super-Structure

'Law, in particular, is only a superstructure ; in reality it only translates the interests of those who hold the reins of command in any given society ; it is an instrument in the service of those who exercise their 'dictatorship' in this society because they have the instruments of production at their disposal, Law is a means of oppressing the exploited

class ; it is, of necessity, unjust. To speak of a 'just' law is to appeal to an ideology—that is to say, a false representation of reality ; law is really the negation of justice.'[1]

The primary function of Soviet Law is not to express a certain concept of justice but to organize the nation's economic forces and to transform the behaviour and attitudes of its citizens. There is no conception of private law in the Soviet legal system. 'We have no more private law', wrote Lenin, 'for with us all has become public law'.[2]

The socialists call other countries as bourgeois countries. Whereas in these countries the law is linked to principles of justice and has moral basis, the Marxist doctrine denounces the morality and teaches that the law is simply a superstructure serving economic interests. For the Marxists, law is nothing but an instrument of policy for those who rule. Law in the U.S.S.R. has no absolute value in itself.

(c) Sources of Soviet Law

Legislation is evidently the main source of law to bring about a complete transformation of society. The Maxist-Leninist doctrine rejects the principle of the separation of powers ; all power is concentrated in the hands of the Supreme Soviet. There is practically no question of separation of powers. Legislative power is exercised exclusively by the Supreme Soviet of the U.S.S.R.[3]

(d) Interpretation and Application of Law

Marxist doctrine in no way implies that laws must be literally applied according to a wholly grammatical interpretation. Consequently the interpretation of legislation by the Soviet Judge is not grammatical but logical ; it intends to interpret the real meaning of legislative texts, taking into account the whole of the system and principles by which the Soviet rulers' policy is unquestionably guided.[4]

As a result of Soviet revolution a number of states in Europe and Asia have become 'people's' or socialist republics and declare their adhesion to Marxist teachings. They aim at building a communist society by the same means as employed in the U.S.S.R. and have the same concept of State and Law as the U.S.S.R.[5]

25

RELIGIOUS AND TRADITIONAL SYSTEMS

The most important families in the modern world are the Romano-Germanic, the Socialist and the Common Law families which extend over the whole of Europe and America and are the most highly developed nations on earth. They are closely linked to the development of Western Civilization. Their adoption in America was not so difficult, the only problem was to adapt them to a different geographical milieu. But the case was quite different in Asia, Africa and Indonesia where European penetration did not take place as in America. However, these families had an enormous influence in Africa and Asia.

The above are the three principal families existing today, the rest are spoken of as religious or traditional systems, independent of each other and not grouped together. Islamic Law is considered to be the most important of these systems. 'Because of its connection with a revealed religion, and its entirely original concepts and theory of sources. Muslim Law is, clearly distinguished from the families examined heretofore'.[1] Let us turn to Islamic Legal System.

26

ISLAMIC LEGAL SYSTEM

(a) Purpose of Legal System

A legal system may be described as an integrated body of rules determined by an inner coherence of meaning. Every legal system is of necessity a 'purposeful enterprise'. According to the teleological school, law is the product of human reason and is intimately related to the notion of purpose and most of the pilolosphers regard justice as the supreme end. The same may be said of all other revealed laws, but unfortunately they are not in their original form.

Law without justice and morality is no law and cannot survive for long. A legal system which does not have substantial anchorage in justice and morality will be ultimately thrown off. History is a living record of such events and incidents where law was cast aside for it lacked in the essentials of justice. The concept of justice, according to Friedmann, is devoid of ideological content.[1]

(b) Absolute Justice

We have discussed the problem of justice under Chapter 5 which reflects the fallibility of reason. It is reason which has resulted in conflicting views

about justice. Absolute justice cannot be known rationally, it is God alone Who knows what is absolutely good and just. We have, therefore, to depend upon revelation which is the only source of genuine knowledge. The superiority of Islamic Law lies in this that it is Divinely revealed and preserved to this day in its pristine purity and original form.

Islamic law is a code of moral conduct quite different from the case law system where precedent is given full respect and followed by the courts. We have already noticed the difference between codified and case law systems. For the sake of more clarity we give here the principal aspects of their difference :[2]

(1) Continental jurisprudence has been decisively influenced by the reception of Roman law ; Anglo American law has not. Instead it is largely the product of gradual historical growth and therefore still shows considerable elements of feudalism.

(2) All Continental systems are essentially codified ; Anglo American law is still based on the common law.

(3) From this follows a different approach to problems of legal interpretation. Judicial decisions in Continental systems are not primary sources of law, but only a gloss on the law. On the other hand, in Anglo American law, precedent is one of the principal sources of law.

(4) It is an aspect of the contrast of inductive and deductive approach that Continental systems,

proceeding from general rules to individual decisions, establish general legal principles, whereas Anglo-American law centres round a decision of individual problems and builds up the principle, from case to case. Such principles as there are, have been developed from a gradual adjustment to practical requirements.

(5) As a corollary to this difference in legal development, Anglo American legal thinking gives a predominant place to the law courts, whereas Continental Jurisprudence thinks of law not only in terms of litigation but largely in terms of its general function.

(6) The dualism of common law and equity in Anglo American law is unknown in Continental systems, where equity is a principle of interpretation applied to any legal question, but not a special body of law.

(7) All Continental systems distinguish in substance and procedure between private law and administrative law. The former deals with legal relations between subjects, as equals, the latter with legal relations between authority of all types and the subject. Anglo-American law has, until recently, rejected this dichotomy and has adhered—at least in theory, to the principle of the equality of all before the law.

(8) The more abstract and generalising approach to law of Continental Jurisprudence has been conducive to the development of legal philosophy, whereas the pragmatic and empiricist character of Anglo-

American law has had the opposite effect. Hence the pre-eminence in Anglo-American law of the analytical school of Jurisprudence, compared with the infinite variety of Continental legal theories.

An examination of these principal points of difference reveals the fact that there exists in each system a different approach to the problems of legal interpretation. Judicial decisions in Continental systems are not primary sources of law but only a supplement to the law, while in Anglo-American law, precedent is one of the principal sources of law. We have discussed in the preceding pages the Rule of precedent. The Continental or the Romano-Germanic family seeks legal rules in a pre-established body of rules, that is, in codes. Decided cases may have some authority but not the sole authority as that of a precedent in the Common law system. In contrast to both these systems decided cases have no authority in Islamic legal system, for the judge in each case is duty-bound to exercise his own power of ijtihad or intepretation. There is no judge-made law in Islam.

(c) Interpretation and Application of Law

The problem of interpretation and application of law is most important in each legal system. This involves efforts in discovering the law, ascertaining which of the many rules in the legal system is to be applied, determining its meaning and applying to the case at hand. 'A code law states the law comprehensively, in general principles,

the finding of the law in an individual case is deductive, an application of general principles to particular facts. A case law system, on the other hand, develops tentatively, and truly casually ; the principles crystallise slowly from decisions in particular cases, and the method of law finding proceeds inductively from the particular to the general'.[3]

In both these systems of the Common law and Romano-Germanic law, reason plays a vital role and the judge has a wide discretion which is dangerous. As Lord Camden has said, the discretion of a judge is 'the law of tyrants'.[4] Aristotle conceived that, a court should have no discretion. To him, the judicial office was Procrustean one of fitting each case to the legal bed, if necessary by a surgical operation.'[5]

Soviet Law is out of question as it has nothing to do with Justice. It is to create an eutirely new social order. 'Like any new body of law it is highly imperative and its interpretation must conform strictly to the intention of the originators. Soviet jurists and judges are expected to interpret law so as to ensure its application in the manner envisaged by its authors. The imperative rather than the rational side of a new body of laws is, naturally enough, always emphasized.'[6]

From the above it is evident that the discretion of a judge, in Soviet legal system, is tied to the policy of the State. But the law in Romano-Germanic countries is composed of general rules which give to the judge a wide discretion, while in Anglo-American legal system 'the Judge is' supposed

to be essentially unfettered by statute but hemmed in by precedent'. Continental Jurists, says Friedmann, have looked with envy upon the freedom with which the Anglo-American judge, unfettered by the dead letter of the law, can meet out justice in the individual case.[7]

(d) Analogical Deduction

Islamic Jurisprudence has solved this problem (of interpetation and application of law) by adopting the principle of analogical deduction. Reason is thus subject to analogy which keeps the discretion of the judge within bounds and also preserves the law both in its ideal form and stability, while the Rule of Necessity and Need serves as a supplement to accommodate the change and to meet the growing needs of society. Stability is thus reconciled with change in the most successful manner. The law is, therefore, perfect and for all time.

Here we have to point out that most of the Orientalists take for law the interpretation of the Qur'ān handed down by the Jurists and think that qadi or judge has only to refer to their works and it is not for him to interpret the Qur'ān.[8] This is a wrong conception. It is the bounden duty of the judge to refer to the Qur'ān as is expressly laid down in the Qur'ān : 'Verily We have sent down to thee the Book in a proper form that thou mayst judge between men as guided by God';[9] 'And those who do not judge by what God hath sent down are indeed unbelievers,[10] wrong doers,[11] rebels.[12] Further, the finality of determination in each case rests with God;

And 'in whatever ye differ, its final determination rests with God'.[13]

In the light of the above Qur'ānic Verses, is it possible for a judge not to interpret the Qur'ān and rely solely upon what has been handed down by the Jurists, or by those who have preceded him ? We are compelled to say that it is due to the superficial study of the Islamic Law that the Orientalists pass such eccentric remarks. They think of Islamic Law in terms of the case law of England where precedents are followed and 'one could say, in fact, that apart from judicial decisions there is no Law in Edgland at all'.[14]

It has become almost a habit with the Orientalists to speak of the Islamic Law as inadequate to modern society. They ignore the fact that society, in Islam, is the product of law whose purpose is to control society and to bring all other societies in line with it. Islam is the world-force and seeks to reform the social system of the whole world, hence cannot adopt the Western way of life. This does not mean that Islamic society is static. It is, on the other hand, dynamic, for Islam says 'yes' to life. The basis of life, as conceived by Islam, is spiritual. A society based on such a conception must have eternal and immutable laws, but since it does not lose sight of the material world which is subject to change, the law contains broad principles that admit of interpretation so as to cover the growing needs of society. Over and above is the Rule of Necessity and Need, as specified above, to cover if anything essential is left uncovered.

(e) Dynamism

Snouck-Hurgronjie's remark that Islamic law belongs to a distant past and 'is in a state of complete passivity reminiscent of a cemetery'[15] is baseless. Had it been so, Islam would not have flourished and Islamic law would have been dead long ago. When ever and wherever it was applied in its totality it proved its merits and worked most successfully. The living example is Saudi Arabia where it has been a brilliant success. The Muslim countries which are cited as deviating from Islamic law are those that have never applied it in all its aspects but were content with a part of it only. Qur'ān speaks of them in the following words : 'Follow ye only a part of the Book and neglect the rest. So, what shall be the reward of anyone among you who does this except disgrace in this life ? And on the Day of Resurrection, they shall be meted out a very severe chastisement, for God is not unaware of what ye do'.[16]

Orientalists have spared no pains in denouncing Islamic law. To them, it is out-dated, outmoded, not original but borrowed from Roman law, while Roman law is basically different from Islamic law. Roman law, like other systems, adopted originally the principle of personality, *i.e.* the law of the state applied only to its citizens. The foreigner was strictly rightless, and unless protected by some treaty between his state and Rome, could be seized, like an ownerless piece of property by any Roman. This basic conception of Roman law is foreign to Islamic law which ensured to non-Muslims not only

the security of life and property but also freedom of their religion. Non-Muslim minorities in a Muslim state are styled Dhimmi 'the protected of God and the Prophet'. 'Beware' ! proclaimed the Prophet, 'I shall myself be the complainant, on the Day of Resurrection, against him who wrongs a Dhimmi or lays upon him the responsibility greater than he bears or deprives him of anything that belongs to him'.[17]

(f) Impartiality

The Constitution of the first Muslim State of Madina, has come to us in its complete form wherein the belief of non-Muslims and their freedom to propagate their religion were safeguarded. It was a covenant between Muslims and Jews and even pagan Arabs joined into it. The non-Muslims were exempted from participation in war on payment of a small tax called jizyah and security of their life and property was thus guaranteed. The term dhimmi amounts to citizenship which was accorded to non-Muslims together with Judicial autonomy— 'Let the followers of the Evangel administer justice in accordance with what God hath revealed therein'.[18]

This is only a short account of the treatment of equality meted out to non-Muslims which is hardly to be found in Roman Law, but Amos says : 'Mohammedan Law is nothing but the Roman Law of the Eastern Empire adapted to the political conditions of the Arab Dominions'.[19] According to Mahmassani, 'this sweeping judgment elicits disdain

because it is an extreme exaggeration and is not supported by scientific evidence required in such historical research.'[20]

(g) Difference between Islamic Law and Roman Law

The fundamental differences between Roman Law and Islamic Law as pointed out by Mahmassani are :[21]

1. Roman women were under perpetual tutelage. They were not empowered throughout their lives to deal with their property without the permission of their guardians. The Shari'ah, on the other hand, recognizes in principle the complete capacity of women to perfom all kinds of lawful transactions.

2. The dowry in Roman Law was a payment to the husband by his wife or one of her family while in Muslim Law the payment is to the wife by the husband.

3. Adoption is not recognized in the Shari'ah while it was an accepted institution in Roman Law.

4. Formalism and complication were evident in Roman contracts and in Roman rules of procedure, while the contrary is the case in the Sharia'h. In the latter it is a maxim that effect is given to intention and meaning and not to words and forms.

5. The transfer of debt was illegal in Roman Law, while in Islamic Law it is sanctioned by all schools of jurisprudence without exception.

6. There are distinct differnces between the two systems in questions of inheritance and wills. In the Shari'ah (Sunni view), for example, a bequest

(in a will) to an heir is unlawful, while in Roman law wills were originally instituted for the purpose of appointing the heirs.

7. The rules of pre-emption and family waqf (endowments) have no parallel in Roman Law.

In view of the above fundamental points of difference, can it be said that Islamic Law is a borrowed system ? A revealed law can never be a borrowed system. God is perfect, so is His Law and therefore must be preserved in its ideal form to serve as a standard of judgment for human acts and transactions and to control society lest it should stray from the right path. Shari'ah, according to the Qur'ānic Verse (25 : 1) is the criterion to distinguish right from wrong and, as such, it is to be kept intact, free from accretions and interpolations. Islam is a present reality, Islamic faith a living organism, and Islamic Law an unerring guide to the right path.—Path of those whom God hast blessed ; who have not incurred His wrath, nor gone astray. (1 : 6-7)

NOTES

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18. Kerr, *Islamic Reform*, p. 100.
19. *Qur'ān*, **4** : 3.
20. *Ibid.*, **6** : 115.
21. Coulson, *Conflicts and Tensions in Islamic Jurisprudence*, p. 20-21.
22. *Qur'ān*, **2** : 229.
23. Coulson, *Conflicts and Tensions in Islamic Jurisprudence*, pp. 60-61.
24. Baihaqi, *Sunan al-Kubra*, Vol. 7, p. 443.
25. A Rahim, *Muhammadan Jurisprudence*, p. 365
26. *Qur'ān*, **10** : 36.
27. Majallah, *Article* 72.
28. Muslim, *Sahih*.
29. Bukhari, *Sahih* ; Ayni, *Umdat*, Vol. 13, p. 257.
30. Majallah, *Article* 1741.
31. *Fatawa Alamgiri*, Vol. 3 ; p. 534 ; A. Rahim, *Muhammadan Jurisprudence*, p. 382.
32. Ibn Qayyim, *Turuq*, p. 70.

33. *Qur'ān*, **24** : 4.
34. A. Rahim, *Muhammadan Jurisprudence*, pp. 376-377.
35. Mahmassani, *Falsafa*, pp. 179-180.
36. *Qur'ān*, **2** : 282.
37. Zailai, *Tabyin*, Vol. 6, p. 209.
38. *Ibid.*, p. 209.
39. Emile Tyan, *Judicial Organization*, in '*Law in the Middle East*', p. 245.
40. *Ibid.*, p. 245.
41. *Qur'ān*, **4** : 59.
42. *Ibid.*, **5** : 47, 48, 50.
43. *Ibid.*, **4** : 59.
44. *Ibid.*, **53** : 3.
45. *Ibid.*, **4** : 80.
46. Bukhari, *Sahih*.
47. Muslim, *Sahih*.
48. Coulson, *Conflicts and Tensions in Islamic Jurisprudence*, p. 70.
49. Marghinani, *Hidaya, tr. Hamilton*, p. 489.
50. A. Rahman, *Madhahib Arabia*, Vol. 3, p. 34 ; Ibn Rushd, *Bidaya* part 2, p. 236 ; Ibn Abedin, *Radd al-Muhtar*, Vol. 4, p. 740 ; Sarakhsi, *Mabsut*, Vol. 22, p. 17.
51. Mahmassani, *Falsafa*, pp. 141-142.
52. See our works entitled '*Insurance and Islamic Law*' ; *Banking and Islamic Law*'.
53. Coulson, *Conflicts and Tensions in Islamic Jurisprudence*, pp. 69-70.
54. Muslehuddin, *Insurance and Islamic Law*, pp. 117-139 ; *Banking and Islamic Law*, pp. 101-106.
55. *Qur'ān*, **2** ; 219, also see our work '*Economics and Islam*, p. 61.
56. Friedmann, *Legal Theory*, p. 46
57. Coulson, *Conflicts and Tensions in Islamic Jurisprudence*, p. 80.

58. *Ibid.*, p. 84-85.
59. Ayni, *Umdat*, Vol. 24, p. 109 ; Sharani, *Mizan*, Vol. 2, pp. 98-99.
60. Ibn Qayyim, *Ilam*, Vol. 3, p. 247.
61. Fazal al-Bari, *Shrh Sahih al-Bukhari*, p. 188.
62. Mahmassani, *Falsafa*, p. 159.
63. Suyuti, *Ashbah*, p. 25 ; Mahmassani, *Falsafa*, p. 159.
64. Ghazzali, *Ihya*, Vol. 3, p. 36.
65. Suyuti, *Ashbah*, p. 25.
66. Mahmassani, *Falsafa*, pp. 159-160.
67. *Ibid.*, p. 160.
68. Bukhari, *Sahih*.
69. Amidi, *Ihkam*, Vol. 3, p. 91.
70. Coulson, *Conflicts and Tensions in Islamic Jurisprudence*, p. 140.

20. (KERR'S 'ISLAMIC REFORM')

1. Kerr, *Islamic Reform*, p. 19.
2. *Ibid.*, p. 1.
3. *Qur'ān*, **5** : 47.
4. *Ibid.*, **5** : 3.
5. *Ibid.*, **4** : 59.
6. Kerr, *Islamic Reform*, p. 4.
7. *Qur'ān*, **4** : 105.
8. *Ibid.*, **5** : 47.
9. *Ibid.*, **42** : 10.
10. Kerr, *Islamic Reform*, p. [illegible].
11. *Ibid.*, p. 223.

22. (ROMANO-GERMANIC FAMILY)

1. David and Brierley, *Major Legal Systems in the World Today*, p. 14.
2. *Ibid.*, p. 21.
3. *Ibid.*, p. 27-28.
4. *Ibid.*, p. 33.

5. Friedmann, *Legal Theory*, p. 533.
6. *Ibid.*, p. 533.
7. David and Brierley, *Major Legal Systems*, p. 85.
8. *Ibid.*, p. 94.

23. (COMMON LAW FAMILY)

1. David and Brierley, *Major Legal Systems*, pp. 15-16.
2. Curzon, *English Legal History*, p. 97.
3. David and Brierley, *Major Legal Systems*, p. 303.
4. *Ibid.*, p. 316.
5. *Ibid.*, p. 317.
6. *Ibid.*, p. 329.

24. (FAMILY OF SOCIALIST LAWS)

1. David and Brierley, *Major Legal Systems*, p. 124.
2. *Ibid.*, p. 157.
3. *Ibid.*, pp. 168-169.
4. *Ibid.*, p. 177.
5. *Ibid.*, p. 227.

25. (RELIGIOUS AND TRADITIONAL SYSTEMS

1. David and Brierley, *Major Legal Systems*, p. 19.

26. (ISLAMIC LEGAL SYSTEM)

1. Friedmann, *Legal Theory*, p. 21.
2. *Ibid.*, pp. 517-518.
3. *Ibid.*, p. 533.
4. Pound, *An Introduction to the Philosophy of Law*, p. 58.
5. *Ibid.*, p. 53.
6. David and Brierley, *Major Legal Systems*, p. 177.
7. Friedmann, *Legal Theory*, p. 536.
8. David and Brierley, *Major Legal Systems*, p. 398.
9. *Qur'ān*, **4** : 105.
10. *Ibid.*, **5** : 47.

11. *Ibid.*, **5** : 48.
12. *Ibid.*, **5** : 50.
13. *Ibid.*, **42** : 10.
14. David and Brierley, *Major Legal Systems*, p. 316.
15. *Ibid*, p. 396.
16. *Qur'ān*, **2** : 85.
17. Al-Mawardi, *Ahkam Sultaniyah*, p. 137; Abu Dawud, *Sunan*, *Kitab al-Jihad*.
18. *Qur'ān*, **5** : 50.
19. Mahmassani, *Falsafa*, p. 137.
20. *Ibid.*, p. 137.
21. *Ibid.*, p. 139.

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